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1934.

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Page 165, line 2 from bottom—
Geoffrey Rose appeared with *Sir Thomas Inskip A.-G.* and *Wilfrid Lewis* for the defendants.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

FOLEY *v.* CLASSIQUE COACHES, LIMITED.

[1933. F. 1528.]

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March 15, 16.

Contract—Sale of land—Supplemental agreement by purchasers to take their petrol supplies exclusively from vendor—Petrol to be supplied "at a price to be agreed by the parties in writing and from time to time"—Arbitration clause—Restraint of trade.

By an agreement in writing the plaintiff agreed to sell and the defendants to purchase a piece of land, adjoining other land belonging to the plaintiff, which the defendants intended to use for their business as motor coach proprietors. The sale was made subject to the defendants' entering into another agreement to purchase from the plaintiff all the petrol required for their said business. On the same date that second agreement, described as supplemental to the first, was executed, which, after reciting that the plaintiff was the proprietor of a petrol-filling station on the land retained by him, provided that the defendants would purchase from him all the petrol required by them for the running of their said business, "at a price to be agreed by the parties in writing and from time to time"; and further, that the defendants would

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purchase no petrol from any other person so long as the plaintiff was able to supply them with quantities sufficient to satisfy their daily requirements. Clause 8 was in these terms: "If any dispute or difference shall arise on the subject matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889."

The land, the subject of the first agreement, was duly conveyed to the defendants, and for three years the defendants obtained their petrol from the plaintiff. Thereafter disputes arose between them, and thereupon the defendants purported to repudiate the second agreement, alleging that it had no binding force because (1.) no agreement in writing as to price had ever been made, and (2.) the clause requiring the defendants to take all their petrol supplies from the plaintiff was an unreasonable and unnecessary restraint of their trade.

In an action by the plaintiff claiming a declaration that the petrol agreement was valid and binding, and an injunction to restrain the defendants from purchasing petrol required for their said business from any person other than the plaintiff:—

Held, (1.) that a term must be implied in the agreement that the petrol supplied by the plaintiff should be of reasonable quality and sold at a reasonable price, and that if any dispute arose as to what was a reasonable price it was to be determined by arbitration pursuant to clause 8; (2.) that inasmuch as the defendants were only required to purchase petrol from the plaintiff for the purpose of the business carried on by them on the land purchased from the plaintiff, and so long only as it was supplied of a reasonable quality and at a reasonable price, the obligation was not an unreasonable and unnecessary restraint of their trade; and (3.) that the agreement therefore was valid and binding on the defendants.

May & Butcher v. *The King* (1929) (post, p. 17) distinguished; *Hillas & Co., Ld.* v. *Arcos, Ld.* (1932) 147 L. T. 503 considered.

Decision of Lord Hewart C.J. affirmed.

APPEAL from a decision of Lord Hewart C.J.

The plaintiff was a retail dealer in petrol and the defendants were the owners of motor coaches who carried on business at premises adjoining those of the plaintiff at 481 Lea Bridge Road, Leyton.

By an agreement in writing dated April 11, 1930, it was agreed that the plaintiff should sell and the defendants should purchase for 1100*l.* the freehold property which immediately adjoined that retained by the plaintiff. The sale was made subject to certain conditions, among others that the defendants would enter into an agreement with the plaintiff as to the sale of petrol and/or oil, the terms of which had been agreed between them. On the same date the agreement as to the sale of petrol and/or oil was signed. It recited that it was " supplemental to an agreement bearing even date herewith and made between the same parties as are parties thereto and whereby the vendor has agreed to sell and the company to purchase " the property in the already mentioned agreement, and " whereas the vendor and his present wife are the proprietors of a petrol and oil filling station at his said address and the company are proposing to carry on the business of char-a-banc and garage proprietors on the said adjoining land and it has been agreed that the vendor shall supply to the company and the company will take from the vendor all petrol as shall be required by the company as hereinafter mentioned. Now it is hereby agreed as follows :—

" 1. The vendor shall sell to the company and the company shall purchase from the vendor all petrol which shall be required by the company for the running of their said business at a price to be agreed by the parties in writing and from time to time.

" 2. The vendor shall deliver the said petrol to the company from the vendor's pumps now or hereafter on his said land.

" 3. This agreement shall remain in force during the life of the vendor and his present wife if she survives him."

Clause 4 dealt with the contingency of a strike or lock-out.

" 5. In the event of the company being wound up . . . . the vendor may determine this agreement at any time after the commencement of such winding-up by giving one week's notice in writing of his intention so to do . . . . and upon the expiration of such notice this agreement shall cease . . . . but without prejudice to the right of action of the vendor in respect of any breach of the company's agreements herein contained.

" 6. The company shall not purchase any petrol from any other person or corporation so long as the vendor is able to supply them with sufficient petrol to satisfy their daily requirements but nothing herein contained shall prevent the vendor from selling petrol and/or oil to any other person or corporation to be used for any purposes whatever provided that the company and their servants shall be at liberty to purchase such petrol as may be found necessary to complete the particular journey when engaged on journeys over a distance necessitating the re-fuelling of their vehicles.

"7. The vendor shall supply the said petrol of a standard and quality at present supplied by the vendor or of such other standard and quality as the company may reasonably approve.

"8. If any dispute or difference shall arise on the subject matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889."

The land, the subject of the first agreement, was duly conveyed to the company, and from April 26, 1930, till October 7, 1933, the defendants bought petrol from the plaintiff in pursuance of the agreement at prices charged by the plaintiff in accounts delivered by him to the defendants each week.

Disputes then arose between the parties as to the price and quality of the petrol, and eventually the defendants' solicitor wrote this letter to the plaintiff dated September 29, 1933: "It appears that although you have supplied petrol to my clients as and when they have required it no agreement in writing as to price has ever been made, nor any agreement of any sort thereunder. My clients have from time to time sent you their cheque in payment of statements of account rendered by you. Having considered this alleged agreement and the aforesaid facts, I have advised my clients that this document is of no force or effect, and therefore, acting on their behalf, I hereby give you notice that my clients do not intend to be bound by any of the provisions contained in this alleged agreement. As from October 8, 1933, my clients will be purchasing their petrol supplies elsewhere."

The plaintiff thereupon issued a writ claiming (1.) a declaration that the petrol agreement was valid and binding upon the parties; (2.) an injunction to restrain the defendants from purchasing any petrol required by them for the carrying on of their said business from any persons other than the plaintiff; (3.) an account of all petrol bought by the defendants in breach of the said petrol agreement from any person other than the plaintiff; and (4.) damages for breach of contract.

The defendants pleaded that no price at which petrol should be sold to them by the plaintiff had been agreed; that the provision relating to the supply of petrol did not constitute a binding and/or complete agreement; that clause 6 of the agreement was an unreasonable and unnecessary restraint of the defendants' trade and was contrary to public policy and illegal; and further, or in the alternative, that that provision was applicable when, and only so long as, the parties agreed the price at which petrol was to be supplied.

The Lord Chief Justice, in the course of his judgment, said: It was contended on behalf of the defendants that I am bound, by virtue of a decision of the House of Lords in *May & Butcher* v. *The King* (1), to hold that the agreement with reference to petrol is not a contract at all, because the price to be paid for the petrol is to be agreed by the parties in writing from time to time. I should very much regret to be compelled to come to such a decision. There is no doubt that the parties intended to make a binding contract and thought that they had done so, and that is a circumstance which, according to the judgments of Lord Tomlin, Lord Thankerton, and Lord Wright in *Hillas & Co.* v. *Arcos* (2) ought to be taken into consideration in deciding whether there is a concluded contract or not. The fact that the agreement is part of the consideration for the land which has been conveyed to the defendants and is still in their possession distinguishes the case, in my opinion, from that of *May & Butcher* v. *The King* (1), and on the whole I think there is a valid and binding contract for the purchase and sale of petrol in accordance with the terms of clauses 1 and 7. In *The Moorcock* (3) Bowen L.J., in reference to implied terms in contracts, said: "The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side. . . . . In business transactions such as this, what the law desires to

(1) See post, p. 17.
(2) 147 L. T. 503.
(3) (1889) 14 P. D. 64, 68.

effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men." The Lord Chief Justice accordingly held that there was a valid and binding contract for the purchase and sale of petrol in accordance with the terms of clauses 1 and 7. If nothing had been said, or if the parties failed to agree the price of the petrol the law would imply that a reasonable price should be paid ; and if any dispute arose as to what was a reasonable price that was to be determined by arbitration pursuant to clause 8. It had further been argued that clause 6 was contrary to public policy and illegal as being an unreasonable and unnecessary restraint of the defendants' trade. As the clause was intended to secure to the plaintiff the benefit of the agreement as a whole, it was not unreasonable or invalid as being in restraint of trade. His Lordship therefore granted an injunction restraining the defendants their agents and servants from any breach of clause 6 and awarded an amount of damages to be ascertained.

The defendants appealed. The appeal was heard on March 15 and 16, 1934.

van den Berg K.C. and *Astell Burt* for the appellants. The petrol agreement in this case is on all fours with that which was considered by the House of Lords in *May & Butcher* v. *The King* (1), where it was held that there was no binding contract. It was there said that an agreement for sale from which the essential term of price is absent is no contract. Here there was no agreement as to the price of the petrol. No doubt it will be said that the price is to be determined by arbitration under clause 8 ; but as to that, the answer is that there was a similar clause in *May & Butcher* v. *The King* (1), and as was there pointed out, the clause could not come into operation if there was no concluded contract. *Hillas & Co.* v. *Arcos* (2) is distinguishable on the terms of the bargain there entered into.

Secondly, clause 6 of the agreement is much too wide, and is therefore unenforceable. It involves an obligation on the

(1) See post, p. 17.

(2) 147 L. T. 503.

appellants to purchase all their petrol supplies from the respondent, not only that required for the business carried on at the premises adjoining the respondent's land, but wherever they may in the future carry on business, however distant from the respondent's land. That is obviously an oppressive obligation. Moreover the agreement, including clause 6, is to be operative during the lifetime of the respondent and of his present wife, should she survive him, but the wife is under no obligation to supply petrol to customers.

Glyn-Jones for the respondent. The petrol agreement was supplemental to the agreement for the sale of the land, the two together constituting one contract. The parties clearly intended to enter into a binding agreement, and that is a circumstance to be considered. In construing the petrol agreement and to give it business efficacy there must be implied a term that the petrol to be supplied shall be sold at a reasonable price, and any dispute as to that falls within the arbitration clause. The facts here are quite different from those being considered in *May & Butcher* v. *The King* (1), and the decision in that case has no bearing.

van den Berg K.C. in reply. The argument for the respondent involves reading in a clause to this effect "and failing agreement as to price the price shall be settled by arbitration." That amounts to making a contract for the parties.

SCRUTTON L.J. In this appeal I think that the Lord Chief Justice's decision was right, and I am glad to come to that conclusion, because I do not regard the appellants' contention as an honest one.

The nature of the case is this : the respondent, the plaintiff in the action, had some land, part of which was occupied by petrol pumps. Adjoining that land was some vacant land belonging to him which the appellants wanted to use as the headquarters for their char-à-bancs, and they approached the respondent, who was willing to sell on the terms that the appellants obtained all their petrol from him. It is quite clear that unless the appellants had agreed to this they would

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(1) See post, p 17.

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never have got the land. There was a discussion whether this term about the petrol and the agreement to purchase the land should be put in one document or in two, but ultimately it was decided to put them in two documents of even date. One relates specifically to the sale and purchase of the land, and that was to go through on condition that the appellants undertook to enter into the petrol agreement, the terms of which had been already agreed. On the same day the second agreement was signed reciting that it was supplemental to the agreement of even date, that is the agreement for the sale of the land. The petrol agreement included a clause that if any dispute or difference should arise on the subject-matter or construction " the same shall be submitted to arbitration in the usual way." It is quite clear that the parties intended to make an agreement, and for the space of three years no doubt entered the mind of the appellants that they had a business agreement, for they acted on it during that time. The petrol supplied by the respondent was non-combine petrol, but he had also combine petrol pumps. The non-combine petrol was supplied to the appellants at a price lower than that paid by the public, and an account was rendered periodically in writing and paid. In the third year some one acting for the appellants thought he could get better petrol elsewhere, and on September 29, 1933, their solicitor, thinking he saw a way out of the agreement, wrote on behalf of the appellants the letter of September 29, 1933, repudiating the agreement. Possibly the solicitor had heard something about the decision of the House of Lords in *May & Butcher* v. *The King* (1) but probably had not heard of *Braithwaite* v. *Foreign Hardwood Co.* (2), in which the Court of Appeal decided that the wrongful repudiation of a contract by one party relieves the other party from the performance of any conditions precedent. If the solicitor had known of that decision he would not have written the letter in the terms he did. Thereafter the respondent brought his action claiming damages for breach of the agreement, a declaration that the agreement is binding, and an injunction to restrain the appellants from purchasing

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1 See post, p. 17.

(2) [1905] 2 K. B. 543.

petrol from any other person. The Lord Chief Justice decided that the respondent was entitled to judgment, as there was a binding agreement by which the appellants got the land on condition that they should buy their petrol from the respondent. I observe that the appellants' solicitor in his letter made no suggestion that the land would be returned, and I suppose the appellants would have been extremely annoyed if they had been asked to return it when they repudiated the condition.

A good deal of the case turns upon the effect of two decisions of the House of Lords which are not easy to fit in with each other. The first of these cases is *May & Butcher* v. *The King* (1), which related to a claim in respect of a purchase of surplus stores from a Government department. In the Court of Appeal two members of the Court took the view that inasmuch as there was a provision that the price of the stores which were to be offered from time to time was to be agreed there was no binding contract because an agreement to make an agreement does not constitute a contract, and that the language of clause 10 that any dispute as to the construction of the agreement was to be submitted to arbitration was irrevelant, because there was not an agreement, although the parties thought there was. In the second case, *Hillas & Co.* v. *Arcos* (2), there was an agreement between Hillas & Co. and the Russian authorities under which Hillas & Co. were to take in one year 22,000 standards of Russian timber, and in the same agreement they had an option to take in the next year 100,000 standards, with no particulars as to the kind of timber or as to the terms of shipment or any of the other matters one expects to find dealt with on a sale of a large quantity of Russian timber over a period. The Court of Appeal, which included Greer L.J. and myself, both having a very large experience in these timber cases, came to the conclusion that as the House of Lords in *May & Butcher* v. *The King* (1) considered that where a detail had to be agreed upon there was no agreement until that detail was agreed, we were bound to follow the decision in *May & Butcher* v. *The King* (1) and hold that there was no

(1) See post, p. 17.

(2) 147 L. T. 503.

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effective agreement in respect of the option, because the terms had not been agreed. It was, however, held by the House of Lords in *Hillas & Co.* v. *Arcos* (1) that we were wrong in so deciding and that we had misunderstood the decision in *May & Butcher* v. *The King*. (2) The House took this line : it is quite true that there seems to be considerable vagueness about the agreement but the parties contrived to get through it on the contract for 22,000 standards, and so the House thought there was an agreement as to the option which the parties would be able to get through also despite the absence of details. It is true that in the first year the parties got through quite satisfactorily ; that was because during that year the great bulk of English buyers were boycotting the Russian sellers. In the second year the position was different. The English buyers had changed their view and were buying large quantities of Russian timber, so that different conditions were then prevailing. In *Hillas & Co.* v. *Arcos* (1) the House of Lords said that they had not laid down universal principles of construction in *May & Butcher* v. *The King* (2), and that each case must be decided on the construction of the particular document, while in *Hillas & Co.* v. *Arcos* (1) they found that the parties believed they had a contract. In the present case the parties obviously believed they had a contract and they acted for three years as if they had ; they had an arbitration clause which relates to the subject-matter of the agreement as to the supply of petrol, and it seems to me that this arbitration clause applies to any failure to agree as to the price. By analogy to the case of a tied house there is to be implied in this contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality. For these reasons I think the Lord Chief Justice was right in holding that there was an effective and enforceable contract, although as to the future no definite price had been agreed with regard to the petrol.

It was said, secondly, on behalf of the appellants that the contract was bad, as para. 6 was in restraint of trade. In my view that contention is clearly untenable. The contract is an ordinary one to purchase petrol from a particular person, and as long as petrol of a reasonable price and quality is supplied—and there is an implied term that it shall be so supplied—there is no undue restraint of trade. It is suggested, however, that the injunction granted to restrain a breach of clause 6 might have this result, that if the appellants moved their coaching business, say to Edinburgh, they would still be required to purchase their petrol in London from the respondent. That, no doubt, would be a ridiculous agreement if it had been made, but it is quite clear that the appellants' obligation to take their supplies of petrol from the respondent applies only to the business carried on by them on the land adjoining the respondent's petrol pumps, and has no application to a business carried on in Edinburgh or Aberdeen or any other place remote from London.

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(1) 147 L. T. 503.

(2) See post, p. 17.

The appeal therefore fails, and no alteration is required in the form of the injunction that has been granted.

Greer L.J. I think the judgment of the Lord Chief Justice was right and ought not to be disturbed. [The Lord Justice read the passage from the Lord Chief Justice's judgment already set out and continued :] In the present case the parties intended that there should be two considerations for the purchase of the land by the appellants, (1.) the payment of 1100*l.*, and (2.) the appellants' promise contained in the agreement of even date to purchase all their petrol from the respondent, and if that second promise does not amount to an agreement then one of the two considerations which both parties intended disappears, and the appellants get the land without implementing more than the first consideration—namely, the payment of 1100*l.* I think the words of Bowen L.J. in *The Moorcock* (1) are clearly applicable to a case of this kind, and that in order to give effect to what both parties intended the Court is justified in implying that in the absence of agreement as to price a reasonable price must be paid, and if the parties cannot agree as to what is a reasonable price then arbitration must take place. It is quite true that one cannot add to a contract an implied term inconsistent with or which contradicts the express terms of the contract, but in a suitable case one can imply a term, and in my judgment to imply a term in this contract that the price of the petrol supplied by the respondent shall be reasonable is in no way inconsistent with the agreement. *May & Butcher* v. *The King* (1) is distinguishable from the present case both on its facts and as to the nature of the agreement. In that case, as I understand, there was no question of anything whatever except the sale of what was called tentage, and there was a term that the purchaser should leave a deposit in the hands of the seller. There was no consideration, unless a term to agree a price in the future was a consideration. It is a common observation that a decision upon the construction of one contract is not an authority upon the construction of another contract in different words and entered into in different circumstances. The facts of this case and the nature of the contract take it out of the authority of *May & Butcher* v. *The King* (1), and leave us free to construe this contract as containing the implied term mentioned. When the buyers through their solicitor said that they would have nothing more to do with the contract they thereby relieved the seller from the obligation that might otherwise have been upon him to discuss in the future what should be the price of the deliveries from time to time. Having repudiated the contract when they were not entitled to do so they cannot rely on the fact that the contract might have broken down in the future because of their possible refusal to pay a reasonable price or their possible refusal to accept what the seller said was a reasonable quality of petrol.

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(1) 14 P. D. 64, 68.

For these reasons I think the Lord Chief Justice's judgment was right both on the main question and also on the point as to restraint of trade.

MAUGHAM L.J. The question raised in this case involves the construction of the agreement dated April 11, 1930.

(1) See post, p. 17.

It is indisputable that unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it. Neither of these propositions was in question either in *May & Butcher* v. *The King* (1) or in *Hillas & Co.* v. *Arcos* (2), and it happens that in the first case the decision was one way and in the second case the other way on the construction of the relevant documents, but in neither was any new principle of construction laid down.

In the present case the respondent, the plaintiff in the action, was the owner of land on which was a petrol-filling station. The appellants desired to buy a part of that property for the purposes of their business of motor coach proprietors. Two agreements were entered into of even date, one being supplemental to the other. The agreements provided for the purchase of the land by the appellants and for the purchase by them of the petrol required in their business. For three and a half years the appellants purchased their petrol from the respondent, but in September, 1933, they repudiated the agreement, saying that it was not binding upon them. I desire to say, first, that it is quite plain from the surrounding circumstances that the agreement as to the sale and purchase of the petrol was intended to be a binding contract and it formed part of the inducement for the sale of the land. Secondly, the agreement was duly stamped and bears all the signs of a legal contract, and was not, as in *May & Butcher* v. *The King* (1), a mere informal letter. In the later case, *Hillas & Co.* v. *Arcos* (2), some weight, although not too much, is to be attached to the fact that the parties conceived that they were entering into a binding contract, and the old maxim applies that the document should, if possible, be so interpreted ut res magis valeat quam pereat. As to the agreement relating to the sale of petrol, I think it is plain that the words in clause 1 that "the company shall purchase

(1) See post, p. 17.

(2) 147 L. T. 503.

from the vendor all petrol which shall be required by the company for the running of their said business" refer to the business intended to be set up next door to the respondent. The two parties were carrying on business side by side, and one of them, the respondent, was to supply petrol from his pumps to the other. That appears also from clause 2, which provides that the vendor shall deliver the petrol from the pumps on his land. The petrol cannot therefore be supplied elsewhere; it is an essential term of the agreement entered into since it is an inducement to the vendor to sell part of his land. Clause 5, which has some bearing on the question we have to determine, says: "In the event of the company being wound up . . . . the vendor may determine this agreement at any time after the commencement of such winding-up by giving one week's notice in writing of his intention so to do to the liquidator of the company, and upon the expiration of such notice this agreement shall cease and no claim shall be made against the company by the vendor but without prejudice to the right of action of the vendor in respect of any breach of the company's agreements herein contained." Why this provision should be inserted if the vendor was not to sell petrol to the buyers I cannot conceive. The obvious implication is that there is an obligation on the vendor which is or may be of some importance, and that in the event of the company being wound up he is entitled to determine the agreement. We now come to clause 6, which provides that "the company shall not purchase any petrol from any other person or corporation so long as the vendor is able to supply them with sufficient to satisfy their daily requirements but nothing herein contained shall prevent the vendor from selling petrol and/or oil to any other person or corporation to be used for any purposes whatever provided that the company and their servants shall be at liberty to purchase such petrol as may be found necessary to complete the particular journey when engaged on journeys over a distance necessitating the refuelling of their vehicles." The only condition there expressed is that the obligation is to last so long as the vendor is able to supply the company with sufficient petrol. Are we to assume that both parties were so ignorant of business that no dispute as to price could possibly arise ? Price is the very basis of this agreement, which surely does not mean that the company are not to purchase petrol from any other person or corporation if they are unable to agree in writing on the price or if the vendor chooses to fix a price above the commercial price which the company could possibly pay. If the clause were to be construed in that way it would be nonsense, and in my opinion it is necessary to imply in clause 6 a proviso that so long as the vendor is able and willing to supply the company with sufficient petrol either at a price to be agreed under clause 1 or at a fair and reasonable price if the price has not been so agreed, the company shall purchase it from him. In coming to this conclusion I am following the old-established rule in the case of tied houses laid down in *Catt* v. *Tourle* (1), and more recently in *Courage & Co.* v. *Carpenter.* (2) In each of these cases the publican agreed that he would not take beer from any one except the brewer. The Court thought it plain that that meant so long as the brewer was willing to supply beer of reasonable quality and at a reasonable price, and that was expressed in the form of the injunction granted in the second of these cases. The judgment of Bowen L.J. in *The Moorcock* (3) has been referred to, where the principle as to implications was stated in admirable terms ; and the same principle involves in the tied house cases that no publican binds himself to take all his beer from a particular brewer at any price the brewer likes to put upon it. There is no distinction in principle between a contract for the price of beer to be paid by the tenant of a tied house and the contract we have in this case.

Two further changes in the agreement should be referred to, namely, clauses 7 and 8. Why should clause 7, which says that "the vendor shall supply the said petrol of a standard and quality at present supplied by the vendor or of such other standard and quality as the company may reasonably

(1) (1869) L. R. 4 Ch. 654.
(2) [1910] 1 Ch. 262.
(3) 14 P. D. 64, 68.

approve," be inserted unless there was a binding obligation on the company to purchase ? Clause 8, the arbitration clause, is in an unusual form, providing that "if any dispute or difference shall arise on the subject matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of the Arbitration Act, 1889." The reference to "subject matter" is not usual in such a clause. Returning now to clauses 1, 5 and 6, in my opinion these constrain the Court to hold that there must be implied in the obligation to sell and purchase the petrol at an agreed price words to this effect : "or, failing agreement, at a reasonable price to be determined under the arbitration clause." If the agreement had stopped short at clause 2 I should have thought that it was unenforceable, but the contract must be construed as a whole, and, construing it as a whole, I come to the conclusion I have stated. The duty of the Court is to ascertain the intention of the parties from the document as a whole. Verba intentioni, non e contra, debent inservire.

On the question as to restraint of trade I agree with what Scrutton L.J. has said, and I can see no reason for altering the terms of the injunction that has been granted. It will of course have effect according to the construction put upon the agreement by this Court, that is, the appellants are only compelled to purchase petrol from the respondent for the purposes of their business carried on next door and so long as the respondent is willing to supply it of a reasonable quality and at a reasonable price from the pumps belonging to him on his land.

Appeal dismissed.

Solicitor for appellants : *J. R. Cort Bathurst.*
Solicitor for respondent : *C. J. Lewis.*

J. S. H.

NOTE.

MAY AND BUTCHER, LIMITED *v.* THE KING.

February 22, 1929.

Petition of Right.

The suppliants, May & Butcher, Ld., who were general contractors, alleged that it was mutually agreed between them and the Controller of the Disposals Board for the purchase by the suppliants of the whole of the tentage which might become available in the United Kingdom for disposal up to March 31, 1923. The material letters for the purposes of the case were dated June 29, 1921, and January 7, 1922. By the earlier of these letters written by the Controller to the suppliants it was stated that "in consideration of your agreeing to deposit with the [Disposals & Liquidation] Commission the sum of 1000*l.* as security for the carrying out of this extended contract, the Commission hereby confirm the sale to you of the whole of the old tentage which may become available . . . . up to and including December 31, 1921, upon the following terms:—

"(1.) The Commission agrees to sell and [the suppliants] agree to purchase the total stock of old tentage . . . .

. . . .

"(3.) The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission.

"(4.) Delivery . . . . shall be taken by the purchasers in such period or periods as may be agreed upon between the Commission and the purchasers when such quantities of old tentage are offered to the purchasers by the Commission. . . . .

. . . .

"(10.) It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889."

By the second letter dated January 7, 1922, the Disposals Controller, referring to verbal negotiations that had taken place for an extension of the agreement between the Commission and the suppliants, confirmed the sale to the latter of the tentage which might become available for disposal up to March 31, 1923. This letter, which varied in certain respects the earlier terms, stated that "the prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free on rail . . . . nearest to the depots at which the said tentage may be lying. . . . ."

Some time later the proposals made by the suppliants for purchase were not acceptable to the Controller, and in August, 1922, the Disposals Board said they considered themselves no longer bound by the agreement, whereupon the suppliants filed their petition of right claiming an injunction restraining the Commission from disposing elsewhere than to the suppliants of the remainder of the tentage; an account of the tentage that had become available; and compensation for the damage done to them.

By the demurrer, answer and plea the Attorney-General said that the petition of right disclosed no sufficient and binding contract for the sale

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to the suppliants of any tentage, and further that it was a term of the contract (if any) that the suppliants should pay a reasonable price for the tentage and that the suppliants were not at the material time ready and willing to pay a reasonable price.

Rowlatt J. held that the letters of June 29, 1921, and January 7 and 18, 1922, constituted no contract but contained merely a series of clauses for adoption if and when contracts were made, because the price, date of payment and period of delivery had still to be agreed; and that the arbitration clause did not apply to differences of opinion upon these questions. The Court of Appeal (Scrutton L.J. dissenting) affirmed Rowlatt J.'s decision.

The suppliants appealed.

Stuart Bevan K.C., *James Wylie*, and *Leon Freedman* for the appellants.

Sir Thomas Inskip A.-G., *Sir Boyd Merriman S.-G.*, and *Bowstead* for the Crown.

LORD BUCKMASTER. My Lords, consequent upon the War there remained at the disposal of the Government a considerable quantity of goods which had formerly been required for the prosecution of the War. In order that these goods might be effectively disposed of, a Disposals Board was set up into whose charge the various Departments handed over such of the surplus stock as they from time to time possessed. The Disposals Board then proceeded to deal with those goods by sale to various people. The present appellants were among the purchasers of that class of goods that related to the construction and equipment of tents and which was called by a word, which has convenience if it has not euphony in its favour, tentage. The first arrangement made between the Disposals Board and the appellants was in April, 1920. The transactions between them all appear to have taken a similar form. There was an agreement for the sale of the goods; there was an agreement that the price for the goods should be subsequently fixed between the parties; and there were provisions with regard to arbitration in the event of dispute. A dispute then arose out of the bargain dated January 7, 1922. At or about that time the control of the Disposals Board was changed; Major Lethaby formerly had charge of it, and Sir Maurice Levy took charge from him. It has been suggested that this caused a difference of relationship between the parties which led to the dispute. Such a suggestion certainly is in no way material to the matter we have to decide, and I am quite unable to find anything throughout these proceedings to justify the suggestion that Sir Maurice Levy did otherwise than what was his duty to do—namely, take the steps he thought most effective to secure the largest price for the goods.

The earlier course of business appears to have been this: the Disposals Board received from the various Departments something in the nature of specifications of the goods that were to be handed over, and these specifications were in turn handed over to the would-be purchaser, who could check them if he liked for himself, or, if not, accept them as they were offered. Sir Maurice Levy discontinued this practice. He said that he did not think it was unreasonable on the part of the appellants to ask for the specifications, but he did not deliver them, and I think it is not difficult to understand why, because if he proceeded to sell by specification instead of selling after inspection, which was always open to the purchaser, he would be bound by the statements in the specification, many of which contained references to the quality and character of the goods which he

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himself had no opportunity of checking. As a business arrangement it was much better he should let the would-be purchaser have the fullest opportunity of inspecting the goods he was going to buy; he could then make his offer; and that was the course in fact pursued. The proposals made by the appellants for purchase were not acceptable to Sir Maurice Levy; the parties were unable to come to an agreement; and the Disposals Board said that they considered themselves no longer bound by the contract. Negotiations failed and the Board declined to deliver any more goods under the attempted bargain. It is that which has given rise to these proceedings.

The points that arise for determination are these: Whether or not the terms of the contract were sufficiently defined to constitute a legal binding contract between the parties. The Crown says that the price was never agreed. The suppliants say first, that if it was not agreed, it would be a reasonable price. 2) Secondly, they say that even if the price was not agreed, the arbitration clause in the contract was intended to cover this very question of price, and that consequently the reasonableness of the price was referred to arbitration under the contract. 3)Thirdly, they say that even if they are wrong on their first two contentions the fact that the whole of the bargain was ended in 1922 was doing them a wrong, because in any event they were entitled to have the opportunity of entering into a further agreement for future parcels of the goods which were referred to in the terms of the contract.

My Lords, those being the contentions, it is obvious that the whole matter depends upon the construction of the actual words of the bargain itself. The contract is contained in the form of a letter. It is written by Major Lethaby, the then Controller of the Disposals Board, to the appellants. It was a letter based upon the payment by the appellants of 1000*l.* as a consideration for the bargain, and it opens in these words: "In consideration of your agreeing to allow the sum of 1000*l.* (one thousand pounds) now held by the Commission to remain on deposit as a security for the due performance of this extended contract, the Commission hereby confirm the sale to you of the whole of the tentage which may become available in the United Kingdom for disposal up to and including March 31, 1923," upon the terms of the earlier contracts. The provision as to price is in these words: "The prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free"; and it is provided that the actual price that has to be paid is to be the subject of further agreement between the parties. That is the result of the terms of one of the earlier bargains incorporated by the reference I have read. There is then a provision that the Commission may "at any time in their uncontrolled discretion and before it has been despatched to or collected by or resold by the purchasers, certify that any portion of the said tentage is required by the British Government and the Commission shall be at liberty to withhold delivery of such portion"; while finally there is an agreement as to arbitration, which again is contained in one of the earlier contracts. The arbitration clause may be important; it is in these words: "It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889."

What resulted was this: it was impossible to agree the prices, and unless the appellants are in a position to establish either that this failure to agree resulted out of a definite agreement to buy at a reasonable price, or that the price had become subject to arbitration, it is plain on the first two points which have been mentioned that this appeal must fail.

In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined. It has been argued that as the fixing of the price has broken down, a reasonable price must be assumed. That depends in part upon the terms of the Sale of Goods Act, which no doubt reproduces, and is known to have reproduced, the old law upon the matter. That provides in s. 8 that "the price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price"; while, if the agreement is to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, s. 9 says that the agreement is avoided. I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a third party and an agreement to permit the price to be fixed in the future by the two parties to the contract themselves. In principle it appears to me that they are one and the same thing. This principle is not without one or two important authorities. I think that Parker J.'s decision in *Von Hatzfeldt-Wildenburg* v. *Alexander* (1) really covers the whole of this dispute, although I agree that the comment upon it by Sargant L.J. in *Chillingworth* v. *Esche* (2) more fully and accurately expresses the whole position; but the principle that you cannot agree to agree remains entirely unchanged. *Loftus* v. *Roberts* (3) is to the same effect. The only way the appellants seek to escape from those authorities is by saying that all related to another subject-matter. If it could be shown that the different subject-matter was the cause of different principles of contract being applied, that would be an effective and relevant argument, but apart from the fact that a contract, one, for example, for the sale of land, requires the consideration of a large number of special details that are wholly unnecessary in relation to a contract for the sale of goods, and apart also from the way in which either of these contracts may be regulated by the Statute of Frauds on the one hand, or by the Sale of Goods Act on the other hand, the general underlying principles of contract are the same in each, and there is no reason why those principles should be in any way varied because of the subject-matter with which they deal. I therefore find myself quite unable to accede to the argument that the authorities to which I have referred are weakened in their application to the present case because it happens that their subject-matter is not the same.

The next question is about the arbitration clause, and there I entirely agree with the majority of the Court of Appeal and also with Rowlatt J. The clause refers "disputes with reference to or arising out of this agreement" to arbitration, but until the price has been fixed, the agreement is not there.

(1) [1912] 1 Ch. 284.
(2) [1924] 1 Ch. 97, 113.
(3) (1902) 18 Times L. R. 532.

The arbitration clause relates to the settlement of whatever may happen when the agreement has been completed and the parties are regularly bound. There is nothing in the arbitration clause to enable a contract to be made which in fact the original bargain has left quite open.

Finally, I cannot take the view that the parties are entitled to an offer for the further parcels, because in my opinion this agreement is not a binding agreement at all, and the suggestion that the payment of the deposit entitled the appellants as of right to these offers, and constituted a valid and binding option, is not to my mind the true construction of what that deposit was for. The deposit was really for the purpose of securing the carrying out of the terms of the bargain when it had been made complete, and for the reasons I have already stated such completion never took place; there never was a complete bargain between the parties, and in my opinion the appellants fail.

VISCOUNT DUNEDIN. I am of the same opinion. This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those brocards of which perhaps we have been too fond, but which often express very neatly what is wanted: "Certum est quod certum reddi potest." Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract. It may be left to the determination of a certain person, and if it was so left and that person either would not or could not act, there would be no contract because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement. No doubt as to goods, the Sale of Goods Act, 1893, says that if the price is not mentioned and settled in the contract it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree. As long as you have something certain it does not matter. For instance, with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer. I have not had time, or perhaps I have not been industrious enough, to look through all the books in England to see if there is such a case; but there was such a case in Scotland in 1760, where it was decided that a sale of a landed estate was perfectly good, the price being left to be settled by the buyer himself. I have only expressed in other words what has already been said by my noble friend on the Woolsack. Here there was clearly no contract. There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, or it might have been quite good if it was said that it was to be settled by arbitration under the Arbitration Act so as to bring in a material plan by which a certain person could be put in action. The question then arises, has anything of that sort been done ? I think clearly not. The general arbitration clause is one in very common form as to disputes arising out of the arrangements. In no proper meaning of the word can this be described as a dispute arising between the parties ; it is a failure to agree, which is a very different thing from a dispute.

As regards the option point, I do not think it can be more neatly put than it was by Rowlatt J. when he said: "It is an option to offer terms on terms that are not agreed. An option to offer a contract which is not a contract seems to me not to carry the case any further than the first way of putting it." For these reasons I agree in the motion.

LORD WARRINGTON OF CLYFFE. I agree. The decision of this case depends upon the application of a well known and elementary principle of the law of contract, which is that, unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation. In the present case we have a document which purports to be an agreement for the sale by one party to the other party of certain specified goods at a price to be hereafter agreed between them. If that price is thereafter agreed there is a binding contract within the principle to which I have alluded ; each of the essential terms of the contract has been agreed. If the parties fail to arrive at an agreement, then the price has not been ascertained in the way in which the parties stipulated that it should be ascertained, and there is therefore no binding agreement.

It is said that this case is to be treated on the same footing as if there had been no fixing of the price ; as if the contract had been silent as to the price, and the law may then imply a reasonable price ; but in the present case the facts preclude the application of any such principle. To do that would not be to imply something about which the parties have been silent ; it would be to insert in the contract a stipulation contrary to that for which they have bargained to give them, not the result of their own agreement, but possibly the verdict of a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed.

With regard to the application of the arbitration clause, the same considerations apply. In the first place, if I am right in the view I take in the events which have happened there is no binding contract, the arbitration clause is not binding, and there is no contract out of which or in reference to which any dispute can arise. But more than that, to apply the arbitration clause would be, as in the attempted application of the doctrine as to reasonable price, to substitute the award of the arbitrator for that agreement between the parties which was the term by which they had originally agreed to be bound.

With regard to the option, I have nothing to add to what has been said by my noble and learned friends. All I can say is that I think the judgments of Sargant L.J. and Eve J. are perfectly unanswerable, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellants : *E. V. Huxtable.*
Solicitor for respondent : *Treasury Solicitor.*

GOODWIN FOSTER BROWN, LIMITED *v.* DERBY CORPORATION.

1933
Oct. 27, 30.

Lands Clauses Acts—Compulsory purchase of land—Compensation—Arbitration—Jurisdiction of arbitrator—Consideration of question of title—When exercise of compulsory powers becomes "effective"—Service of notice to treat—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 6, *sub-s.* 1.

The Acquisition of Land (Assessment of Compensation) Act, 1919, which amends the law as to the assessment of compensation in respect of land acquired compulsorily for public purposes, and appoints official arbitrators for determining questions of disputed compensation, provides by s. 6, sub-s. 1, ". . . . the official arbitrator may . . . . state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court":—

Held, that under that provision the official arbitrator is entitled to state his award in the form of a special case raising the question what is the title or interest of the person claiming compensation.

A local Act having authorized a corporation to acquire certain premises compulsorily, the owners granted a lease for a term of years, containing a clause that the demise was made and granted "subject to the termination of such demise by reason of the exercise by the said corporation of such compulsory powers as may hereafter become effective.". The corporation served a notice to treat upon the lessor in respect of his reversionary interest in the premises, and they afterwards served a notice to treat upon the lessee, who claimed compensation in respect of his interest:—

Held, that neither of the notices to treat was, within the meaning of the clause in the lease or at all, such an exercise by the corporation of their compulsory powers as was effective to terminate the lease or to put an end to the lessee's interest in the premises, and, consequently, that he was entitled to compensation in respect of his interest in the premises as at the date of the service of notice to treat upon him.

Guest v. *Poole and Bournemouth Ry. Co.* (1870) L. R. 5 C. P. 553 and *In re Uxbridge and Rickmansworth Ry. Co.* (1890) 43 Ch. D. 536 followed.

Special Case stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

By an agreement in writing dated June 17, 1929, and expressed in terms substantially similar to those of the lease next hereinafter mentioned, Messrs. W. A. Reid and P. C. Cooper-Parry, the freeholders of premises in Full Street, Derby, comprising a warehouse, offices, store rooms, yard, garages and fixtures, and falling within the limits of the Act next mentioned, agreed to let the premises to Messrs. Goodwin Foster Brown, Ld., grocers and provision merchants, hereinafter called "the claimants"; and on the date of that agreement the claimants entered into possession of these premises.

The Derby Corporation Act, 1929 (20 Geo. 5, c. xxii.), which received the royal assent on July 29, 1929, authorized the Derby Corporation, hereinafter called "the acquiring authority," to acquire such of the lands as were included within the limits defined by the Act as might be required for purposes therein specified; and incorporated the Lands Clauses Acts and the above Act of 1919.

By a document purporting to be a lease under seal made on August 19, 1929, Messrs. Reid and Cooper-Parry let to the claimants for five years from June 17, 1929, with an option to extend that term for a further five years the above-mentioned premises at the yearly rent of 750*l.*, the document containing the following clause: "2. The Derby Corporation having given notice that the premises hereby demised have been scheduled for compulsory acquisition under the provisions of a bill promoted by them in Parliament which has not yet been passed this demise and the option hereinafter granted for an extension thereof are made and granted subject to the termination of such demise by reason of the exercise by the said corporation of such compulsory powers as may hereafter become effective." The document further provided (clause 3) that the lessees to the intent that the obligation might continue throughout the term covenanted to paint all the internal wood iron and other work in and about the premises in the last year of the term; to keep the premises insured during the term; and to yield up the premises at the determination of the tenancy in good and tenantable repair; and (clause 4) that the lessors covenanted that the lessees paying the rent reserved and observing the covenants on their part should subject to clause 2 peaceably hold and enjoy the premises during the term.

Before the date next mentioned the acquiring authority served upon the lessors a notice to treat dated October 12, 1929, in respect of their reversionary interest in the premises.

By letter dated November 7, 1929, the acquiring authority served upon the claimants a notice to treat dated October 12, 1929, in respect of their interest as lessees in the premises.

On December 23, 1929, the claimants delivered to the acquiring authority a formal written claim for compensation in respect of the acquisition of the claimants' interest in the premises and consequential loss and damage to the claimants.

On July 25, 1931, the claimants vacated the premises in consequence of the service of the notice to treat, having up to that date paid the rent reserved.

On September 29, 1931, the acquiring authority obtained the freehold reversion of the premises subject to any right or interest of the claimants therein, exclusive of all fixtures.

The claimants and the acquiring authority being unable to come to an agreement in regard thereto, the question as to the amount of the compensation was referred to the official arbitrator.

Before the hearing of the arbitration, however, the parties came to an agreement that the compensation should be 3165*l.* 18*s.* 4*d.*, the payment of that sum to be conditional upon the claimants proving their interest in and title to the premises.

On July 19, 1932, the hearing took place before the arbitrator.

At the hearing the above-mentioned facts were admitted.

It was contended on behalf of the claimants (inter alia): (1.) that having regard to the fact that the amount of compensation to be paid had been agreed between the acquiring authority and the claimants, leaving outstanding only the question of the claimants' title, the arbitrator had no jurisdiction except to make his award in the agreed terms; (2.) that the claimants would then have to sue on his award and would thereby be enabled to submit the question of title for decision by the Court; (4.) that to make his award in the form of a special case would be to deprive the claimants of the right to adduce further evidence to prove their title or interest in the lands and premises; (5.) that s. 6, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919 (1), did not give an official arbitrator power to state such a special case or to make his award in the form of a special case when the question of law was one of title or interest in the lands and premises the subject of the arbitration; (6.) that questions as to title and interest were not questions of law which could arise in the course of the proceedings of an arbitration under the Act of 1919, as they were not within the jurisdiction of the tribunal assessing the compensation; (7.) that the validity of the title claimed could not be disputed in proceedings taken for the assessment of compensation under the Act of 1919; and (8.) that if it was lawful and proper for the arbitrator to state his award in the form of a special case, the claimants contended that they had the title to and interest in the lands and premises as alleged in their written claim, and therefore that he should make his award for the sum agreed.

It was contended on behalf of the acquiring authority: (1.) that the proper course for the arbitrator to follow was to state his award in the form of a special case for the opinion of the High Court; (2.) that he had power to do so under the Act of 1919; (3.) that the notice to treat served upon the lessors of the premises, and/or the acquisition by the acquiring authority of the reversionary interest of the lessors in the premises was an effective exercise by the acquiring authority of their compulsory powers within the meaning of clause 2 of the lease; (4.) that upon the date of such effective exercise of their compulsory powers the demise to the claimants of the above premises was duly terminated by reason of the terms of clause 2 of the lease; and (5.) that after the date of such effective exercise of compulsory powers the claimants remained in occupation of the premises as tenants at will of the acquiring authority.

On March 6, 1933, the arbitrator made his award in the form of a special case, which stated the above facts and submitted the following questions for the opinion of the Court:—

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(1) The sub-section, so far as material, is set out above in the headnote.

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1. Whether it was lawful and proper for the arbitrator to state his award in the form of a special case, or whether he must make his award for the claimants for the amount agreed between the parties.

2. If it was lawful and proper for him to state his award in the form of a special case, what was the claimants' title to and interest (if any) in the lands and premises.

3. If the claimants had a lease for five years from June 17, 1929, with an option for renewal for a further five years, then the arbitrator found that the acquiring authority had agreed to pay to the claimants as compensation the sum of 3165*l.* 18*s.* 4*d.*

4. If the claimants had not the title to or interest in the lands and premises as alleged in their claim, then he found that they were not entitled to any sum by way of compensation.

The arbitrator also made alternative awards regarding costs.

Montgomery K.C. and *A. Capewell* for the claimants. There is a preliminary objection to the hearing of this appeal. The arbitrator, who was an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, had no jurisdiction under that Act or at all to state his award in the form of a special case raising the question whether the claimants had a good title in law to the premises in question. Under s. 6, sub-s. 1, of that Act, as under the corresponding provisions of earlier Acts, the jurisdiction of the arbitrator is limited to assessing the amount of the compensation, and to stating a special case for the High Court on any question of law arising in the course of the proceedings. Here the parties had by agreement fixed the amount of the compensation, and no question of law as to the claimants' title was raised in the course of the arbitration proceedings. Consequently, the only duty of the official arbitrator was to award to the claimants the agreed sum. He had no jurisdiction to consider the question of the claimants' legal title or to state a case raising that question for the opinion of the Court: *Reg.* v. *Metropolitan Ry. Co.* (1); *In re Brandon's Estate* (2); *In re Dare Valley Ry. Co.* (3); and *Brierley Hill Local Board* v. *Pearsall.* (4) If the acquiring authority disputed the claimants' title their proper course was to leave the claimants to bring an action for that sum, and then by way of defence to deny their title. As to the merits, if the arbitrator had jurisdiction to state this case raising the question of the claimants' title in law, then the claimants submit that on the date on which the value of their interest in the premises had to be considered for the purpose of compensation, namely the date on which the notice to treat was served on them, they had under the lease a valid title to and interest in the premises as lessees for five years with an option of renewal for a further five years, subject, by clause 2, to the termination of the demise by the exercise by the Derby Corporation of such compulsory powers as might thereafter become effective. There has not been any exercise by the corporation of such compulsory powers as was effective to terminate the lease and the claimants' title to the premises or to put an end to their interest in them. Neither the service of the notice to treat upon the lessors nor the service of the notice to treat upon the claimants was an effective exercise of the compulsory powers of the corporation for that purpose: *Guest* v. *Poole and Bournemouth Ry. Co.* (5) and *In re Uxbridge and Rickmansworth Ry. Co.* (6) Nor could the acquisition of the lessors' reversionary estate by the corporation be effective to destroy the claimants' interest as at the material earlier date on which they were served with notice to treat. It is plain from the other clauses of the lease that the claimants' leasehold title and interest were to continue until they were actually acquired by the corporation. Clause 2 was inserted in the lease merely as a warning by the lessors to the lessees that there was a risk of the premises being compulsorily acquired during the term, and as a protection to the lessors

(1) (1863) 32 L. J. (Q. B.) 367.
(2) (1865) 34 L. J. (Ch.) 333.
(3) (1868) L. R. 6 Eq. 429.
(4) (1884) 9 App. Cas. 595.
(5) L. R. 5 C. P. 553.
(6) 43 Ch. D. 536.

in case of their being so acquired. In view of these considerations the claimants are entitled to the sum which the arbitrator in No. 3 of the questions submitted by him to the Court has found that the corporation agreed to pay to them as compensation.

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Joy K.C. and *T. N. Winning* for the Derby Corporation, the acquiring authority. The preliminary objection is of no weight. The official arbitrator had jurisdiction both under and apart from the Act of 1919 to state his award in the form of a special case raising the question of the claimants' title to the premises. It is not disputed that the jurisdiction of the arbitrator was limited to assessing the amount of the compensation to which the claimants were entitled by reason of the compulsory taking of the premises. In order to assess the compensation it was, however, essential that the arbitrator should ascertain what title in law the claimants had to the premises. The question as to the claimants' title was therefore a question of law arising in the course of the proceedings within the meaning of s. 6, sub-s. 1, of the Act of 1919, and the official arbitrator had jurisdiction under that provision to state his award in the form of a special case submitting that question for the opinion of the High Court. The cases cited on this point on behalf of the claimants do not show that an arbitrator may not state a case raising any question of law which must be decided in order that the amount of the compensation may be arrived at. These cases were decided on the provisions of the Lands Clauses Consolidation Act, 1845, or the Public Health Act, 1875, which are less explicit than s. 6, sub-s. 1, of the Act of 1919. Since these cases were decided it has more than once been held, expressly or by implication, that an arbitrator has power to state a case on a question of law arising on the facts, the decision of which is necessary to the assessment of the compensation: *Rhodes* v. *Airedale Drainage Commissioners* (1) and *Wright* v. *President of the Air Council.* (2) If the arbitrator in stating this case exceeded his jurisdiction, the claimants should have

(1) (1876) 1 C. P. D. 402.

(2) (1929) 143 L. T. 43.

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made an application to the Court for a certiorari, and as they failed to do so they cannot now raise this objection.

As to the other contention on behalf of the claimants, it is submitted that they have no title in law to the premises in question. Clause 2 of the lease of the premises which was granted to them provided that the demise was made subject to the termination thereof by the exercise by the Derby Corporation of such compulsory powers as might thereafter become effective. The service of the notice to treat upon the claimants was within the meaning of that clause such an exercise by the corporation of their compulsory powers as was effective to terminate the lease on the date of the service of that notice which was the material date for the assessment of compensation. Even the previous service of notice to treat upon the lessors was an exercise by the corporation of their compulsory powers which was effective for that purpose. At all events the acquisition by the corporation of the freehold reversion of the premises was effective for that purpose. These acts or one or other of them not only terminated the claimants' leasehold title to the premises, but put an end to any interest which they might have had therein. The claimants are not therefore entitled to any compensation, and effect should be given to the finding of the arbitrator expressed in No. 4 of the points submitted by him to the Court.

LORD HEWART C.J. This is an award stated in the form of a special case by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. The case involves some matters which are in my view by no means free from difficulty, but I have come to the conclusion that on the whole the contention on behalf of the claimants is correct and should be upheld.

There was a period during the hearing of the case when it was argued that an arbitrator could not deal with a question of title. Our attention was directed to various authorities upon that point, but none of them went to show that an arbitrator might not state a special case upon the question of title, and since s. 6 of the Act of 1919 came into operation, following as it did similar provisions in earlier Acts, it seems to me to be quite clear that the arbitrator has power to state in the form of a special case for the opinion of the High Court any question of law arising in the course of the proceedings including a question of title, and also power to state his award as to the whole or part in the form of a special case for the opinion of this Court.

Here the Derby Corporation had been authorized to acquire lands compulsorily, and the official arbitrator was dealing with a difficult question relating to the interests of the claimants as against the corporation in respect of certain of these lands of which the claimants were said to be the lessees by virtue of a lease made on August 19, 1929. Clause 2 of that lease provides that the demise is made and granted "subject to the termination of such demise by reason of the exercise by the said corporation of such compulsory powers as may hereafter become effective." A question of difficulty that arises under that clause is, at what date did the exercise by the corporation of those compulsory powers or some of them become effective? There is, indeed, a preliminary question whether this particular clause affects these claimants at all in the present matter. The clause is ambiguous and it may well be that, so far as the claim of these claimants is concerned, the clause is of no force and effect. If it is of force, then it ought to be construed not against the claimants but against the corporation. When Mr. Joy in the course of his very able argument was faced with the difficulty of saying when, if at all, the exercise by the corporation of the compulsory powers under the local Act became effective, he gave or seemed to give two answers. One of these was that the exercise of the powers became effective at the date of the service of the notice to treat upon the claimants, namely November 7, 1929; and the other was that it became effective at the date of the service of the notice to treat upon the lessors and/or the acquisition by the acquiring authority of the reversionary interest of the lessors in the premises, as was urged in para. 3 of the points of law submitted by the acquiring authority. In my view that argument places upon a notice to treat an importance which it does not deserve. Mr. Montgomery cited to us a series of cases forming part of a much larger whole, in which it has been considered whether the notice to treat may or may not be the exercise of compulsory powers, and in two of these cases (1) at any rate it was expressly stated that the service of the notice to treat was not the exercise of compulsory powers. Once that difficulty is got rid of the position is that the lessees' interest is to be looked at as at the date of the notice to treat served upon them, namely November 7, 1929. At that date there had been no determination of this lease and it was quite uncertain when the lease would be determined. Apparently it might run for the full term of five years with a possible extension for a further period of five years. Looking at the claimants' interest in that way the official arbitrator has said in para. 3 of his award that if the claimants have a lease for five years from June 17, 1929, with an option for renewal for a further five years, then he finds that the acquiring authority have agreed to pay to the claimants as compensation the sum of 3165*l.* 18*s.* 4*d.* It seems to me that on the true construction of the lease the claimants had that interest and are entitled to that sum and to the corresponding amount of costs allowed in the concluding part of this case stated.

AVORY J. As to the first point raised, namely, whether the arbitrator had power to state a special case in the form in which he stated it, I have nothing to add to what my Lord has said. It is clear, I think, that he has not purported to take upon himself to determine any question of title or interest but has reserved that question to this Court, it being stated in the case that before the hearing of the arbitration the parties agreed the compensation at a certain sum, the payment of that sum being conditional upon the claimants proving their interest in and title to the premises.

The substantial question in this case is whether the claimants upon this statement of facts do prove their alleged interest in and title to the premises—namely, an interest under a lease thereof for five years with the option of a further five years. I agree with what my Lord has said that, if clause 2 of the lease of August 19, 1929, is ambiguous in its terms, it must be construed in the sense most favourable to the lessees, and most adverse to the lessors, and therefore, for the purpose of this case, as between the acquiring authority and the claimants in the sense most favourable to the claimants. In my view, however, there is no such ambiguity in the clause as to call that principle into operation. The whole contention on the part of the acquiring authority as to the meaning and effect of that clause is succinctly stated in para. 3 of the points of law submitted by them—namely, that the notice to treat served upon the lessors or the acquisition by the acquiring authority of the reversionary interest of the lessors was an effective exercise by the acquiring authority of their compulsory powers within the meaning of clause 2 of the lease. Upon the authority of the cases which have been cited, namely, *Guest* v. *Poole and Bournemouth Ry. Co.* (1) and *In re Uxbridge and Rickmansworth Ry. Co.* (2), I do not think that the notice to treat served upon the lessors was an effective exercise of the compulsory powers. As those cases state, the service of such a notice to treat may be a step towards the exercise of the compulsory powers, but it is not in itself an exercise of these powers. The second ground on which it is said by the acquiring authority that there was an effective exercise of the compulsory powers is the acquisition of the reversionary interest of the lessors. That in fact took place on September 29, 1931, and, if it is suggested that the demise was determined at that date, it must be borne in mind that, for the purpose of assessing compensation to the lessee, what has to be considered is the interest which he, the lessee, had in the premises at the date when notice to treat was served upon him, and that notice to treat had been served upon the claimants on November 7, 1929. It seems therefore to follow that at that last-mentioned date, which is for the present purpose the date to be considered, the claimants still had the interest created by the lease and, according to the contention, it had not then been determined, because it was not in fact determined until September, 1931. It thus appears to me that on neither of the grounds relied upon by the acquiring authority was there an effective exercise of their compulsory powers within the meaning of clause 2 of the lease so as to deprive the claimants of their interest in the premises at the material date, which was November 7, 1929.

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(1) *Guest* v. *Poole and Bournemouth Ry. Co.*, L. R. 5 C. P. 553; and *In re Uxbridge and Rickmansworth Ry. Co.*, 43 Ch. D. 536.

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(1) L. R. 5 C. P. 553.
(2) 43 Ch. D. 536.

For these reasons I agree that the award should stand as set out in para. 3 of the matters submitted for the opinion of the Court, and that the claimants are, therefore, entitled to be paid as compensation the sum which has been agreed at 3165*l*. 18*s*. 4*d*.

LAWRENCE J. I am of the same opinion. There are two constructions to choose between of clause 2 of the lease. The claimants and the acquiring authority are agreed in suggesting that the purpose of that clause was to protect the lessors against any possible claim by the lessees in case the acquiring authority should exercise their statutory powers ; but whereas the claimants allege that that was the sole object and effect of the clause the acquiring authority contend that it has the additional effect by reason of the words used of putting an end to the interest of the lessees in the lease altogether. It is clear, I think, that an effective exercise of the compulsory powers would terminate the demise, but, in the absence of clause 2, it would not put an end to the lessees' interest. The lessees' interest would then have to be valued and paid for. It seems to me that the words of clause 2 are satisfied by reading them as referring to that inevitable fact and as having been inserted for the protection of the lessors against any assertion by the lessees of a greater interest than they might in fact have, and for no other purpose. The words are not, I think, sufficiently clear to indicate an intention to put an end to the lessees' interest and to transfer that interest to the lessor with the result that the lessor would be entitled as at the date of the exercise of the compulsory powers to compensation as a freeholder without any lease existing.

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I think that the difficulties which have been adverted to by my Lord and my brother Avory point to this being the true construction, and I am, therefore, of opinion that the claimants are entitled to the sum of 3165*l.* 18*s.* 4*d.* which has been agreed upon.

[As the case was not a consultative case the Court did not answer the four questions submitted to it seriatim and specifically, but answered question 1 in the affirmative, and as to question 3 declared that the claimants were entitled to the sum of 3165*l.* 18*s.* 4*d.* there mentioned.]

Solicitors for the claimants: *Timbrell, Deighton & Nichols, for Weston, Fisher & Weston, Kidderminster.*

Solicitor for the acquiring authority: *Trevelyan Lee, Town Clerk, Derby.*

J. R.

pplied. CLIFT *v.* TAYLOR. [1948] All E.R. 113.

Followed. IRELAND *v.* TAYLOR. [1948] 2 All E.R. 450.

WHITEMAN SMITH MOTOR COMPANY, LIMITED *v.* CHAPLIN AND ANOTHER.

1934
Feb. 14, 15; *March* 5.

Landlord and Tenant—Business premises—Motor garage business—Termination of tenancy—Compensation for Goodwill—Claim for new lease—Method of assessing value of Goodwill—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5.

The plaintiffs were the tenants of premises at which they and their predecessor in title had carried on the trade or business of a motor garage, repair works, and petrol-filling station for nearly fourteen years. They claimed under s. 5 of the Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), that a new lease of the premises should be granted to them on the ground that the sum that could be awarded to them as compensation for goodwill under s. 4 would not compensate them for the loss they would sustain if they removed and carried on their business elsewhere. The referee appointed under s. 21 of the Act adopted the following process in arriving at the value of the goodwill under the Act. Having assessed the average annual profits of the business at 750*l.*, he took one-third of that sum, i.e. 250*l.*, and capitalized it at 2½ years' purchase, making the capital value of the adherent profit 625*l.* With that sum he compared the capital value of the increase in rental value of the premises due to causes irrespective of the tenants' trade or business. He found, as a fact, that the increase in rental value due to causes other than the trade or business was 50*l.* a year. That sum he capitalized on what was called "the 7 per cent. table," or, at approximately, 14¼ years' purchase, arriving at a sum of over 700*l.*, and as that sum was more than the 625*l.* capitalized value of the adherent profit, the referee was of the opinion that no compensation for goodwill was payable to the plaintiffs under the Act, and he could not recommend that a new lease should be granted to them. His report was adopted by the county court judge, who refused to grant a new lease on the ground that the plaintiffs had not shown a goodwill entitling them to compensation :—

Held, by the Divisional Court (Scrutton and Maugham L.JJ., sitting as additional judges of the King's Bench Division), that the referee had adopted a wrong process in arriving at the value of the goodwill within the meaning of s. 4 of the Act. The test required by that section was to ascertain the difference between the rental value with goodwill and the rental value without goodwill.

Per Scrutton L.J.: I am inclined to think, on reconsideration, that in *Simpson* v. *Charrington & Co., Ld.* [1934] 1 K. B. 64, 70, I attached too much importance to the views of the Court in *Llewellyn* v. *Rutherford* (1875) L. R. 10 C. P. 456, 469, as to circumstances not directly due to the tenant's activities. . . . On consideration, I do not think that this decision is applicable to cases under the Landlord and Tenant Act, 1927, where the statute expressly provides that the compensation for goodwill must not exceed the addition of value to the holding which is determined to be the direct result of the carrying on of the trade by the tenant. Change of population or character of the business, or change in the value of the site, is not the direct result of the tenant's trading. I think, on reconsideration, the passage at page 70 of the report of *Simpson* v. *Charrington & Co., Ld.* [1934] 1 K. B. 64 went too far in its reliance on the judgments in *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456.

APPEAL from Bloomsbury County Court.

The plaintiffs were the tenants of premises adjoining the Swiss Cottage Inn, St. John's Wood, where they and their predecessor in title had carried on the trade or business of a motor garage, repair works, and petrol-filling station for a period of nearly fourteen years. The defendants, brother and sister, as trustees, were the legal owners of the reversion expectant on the determination of the lease. The freehold of the premises was vested in the two defendants, as trustees, they themselves, together with two other sisters, being the beneficiaries.

On August 15, 1932, the plaintiffs gave a notice to a Mrs. Chaplin, the then owner of the reversion expectant on the determination of the lease, expressed to be under the Landlord and Tenant Act, 1927, of their claim to be entitled, on the termination of the lease, to compensation for goodwill under s. 4 of the Act (1); but stating that, as the sum that could be awarded to them under that section would not compensate them for the loss of goodwill they would suffer if they removed and carried on business elsewhere, they also claimed to be entitled to a new lease of the premises in accordance with s. 5, sub-s. 1.

On January 4, 1933, Mrs. Chaplin died, and by an order dated January 19, 1933, her name was struck out of the proceedings and the names of C. A. Chaplin and Frances Minnie Pollak, brother and sister, children of the deceased Mrs. Chaplin, were substituted as defendants.

The matter was referred under s. 21, sub-s. 2, of the Act to a referee, who reported that he was not of opinion that the plaintiffs had succeeded in establishing goodwill under s. 4 of the Act. The referee found that the average of yearly profits of the business for present purposes did not exceed 750*l.* He took one-third of that sum as being the average yearly amount of "adherent profit," i.e., profit which alone was to be taken into consideration in estimating the amount of compensation payable for goodwill under the Act. He then capitalized that sum of 250*l.* at 2½ years' purchase. With the sum so arrived at he compared the capital value of the increase in annual rental value of the premises which was due to causes irrespective of the plaintiffs' trade or business. The referee found on the facts that the increase in rental value of the premises due to causes other than the trade was 50*l*. a year. That sum he capitalized on what was called "the 7 per cent. table," i.e., at 14·28 years' purchase. That gave a sum of over 700*l*., which was in excess of the capitalized adherent profit of 625*l*. It followed that in his opinion no compensation was payable for goodwill under the Act, and he could not recommend the grant of a new lease to the plaintiffs.

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(1) Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto: Provided that—(*a*) the sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title, ..."

Sect. 5, sub-s. 1: "Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may . . . . serve on the landlord notice requiring a new lease of the premises . . . . to be granted to him."

The plaintiffs moved to vary the report. The county court judge adopted the report of the referee and refused the plaintiffs a new lease on the ground that they did not show a goodwill entitling them to any compensation, and therefore they could not be entitled to a new lease.

The plaintiffs appealed to the Divisional Court. The appeal was heard by Scrutton and Maugham L.JJ. (sitting as additional judges of the King's Bench Division) on February 14 and 15, 1934.

E. W. Cave K.C. and *S. P. J. Merlin* for the appellants. It is fair to say that the decision of the county court judge in this case was given before the case of *Simpson* v. *Charrington & Co., Ld.* (1), was decided by the Court of Appeal. The county court judge has misconstrued s. 4 of the Landlord and Tenant Act, 1927. Under that section a tenant of business premises becomes entitled, at the termination of the tenancy, on quitting the holding, to be paid by his landlord compensation for goodwill, if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years, goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached, provided that the sum to be awarded as compensation for goodwill shall not exceed such addition to the value of the

(1) [1934] 1 K. B. 64.

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holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business of the tenant or his predecessors in title. Under s. 5 a new lease of the premises may be applied for by the tenant if the sum which could be awarded to him under s. 4 would not compensate him for the loss of goodwill he would suffer if he removed his business to other premises. The plaintiffs have built up a goodwill of considerable value. If the decision of the county court judge is to be upheld the benefit of that valuable goodwill will be reaped by the landlords, which is contrary to the meaning of the Act. The method of ascertaining the value of the tenants' goodwill which was adopted by the referee was fallacious. In capitalizing the adherent profit he adopted one multiplier, but in capitalizing the increased rental value due to causes other than the tenants' trading he used a different multiplier. That was wrong. The referee was also wrong in ascribing the whole of the increased rental value to causes other than that of the tenants' trading. Why did the referee diminish the profit of the business by the increased rental value due to other causes? The referee's calculation is not well founded. The sum that the plaintiffs would get under s. 4 would not compensate them for the loss of goodwill, and a new lease should be granted. The case of *Llewellyn* v. *Rutherford* (1), referred to in the judgments in *Simpson* v. *Charrington & Co., Ld.* (2), did not contain the same factors as cases under the Act of 1927.

[They also referred to *Hudd* v. *Matthews* (3) and *Stumbles* v. *Whitley*. (4)]

A. S. Comyns Carr K.C., *Leslie Lea*, and *Leonard Lewis* for the respondents. No good ground has been shown for disturbing the decision of the county court judge. The question is whether the premises could now be let at a higher rent by reason of the goodwill than they could if there were no goodwill. There is no evidence that they could. The onus was on the plaintiffs to prove goodwill within the meaning of s. 4, and it is submitted that they have not discharged that onus. It is a garage business with petrol pumps, and the referee has found that that part of the business is entirely casual and depends on such things as the situation of the premises, the increase in motor traffic, rather than on the tenants' efforts. The plaintiffs have not proved any goodwill entitling them to the grant of a new lease under s. 5 of the Landlord and Tenant Act, 1927.

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(1) L. R. 10 C. P. 456.

(2) [1934] 1 K. B. 64.

(3) [1930] 2 K. B. 197.

(4) [1930] 1 K. B. 393; affirmed in H. L. [1930] A. C. 544.

Cur. adv. vult.

1934. March 5. The following written judgments were read :—

SCRUTTON L.J. Tenants, whose lease of a garage was about to expire, demanded under the Landlord and Tenant Act, 1927, a new lease. The county court judge, adopting the decision of the referee, has refused them a new lease on the ground that they do not show a goodwill entitling them to any compensation and therefore cannot be entitled to a new lease. The compensation given under the Act is not what the tenant has lost by having to leave the premises at the end of the lease, but the additional value that the landlord has gained by acquiring the premises at the end of the lease : *Hudd* v. *Matthews.* (1) The Act, however, provides that only that part of the additional value gained by the landlord is to be considered which is the direct result of the carrying on of the business by the tenant, and which is not exclusively due to the situation of the premises. The tenants now appeal.

The wording of the Act requires careful attention. It gives the tenant a right to compensation at the end of his lease on certain statutory terms, and a right to have a new lease granted to him on certain statutory terms. The terms entitling the tenant to compensation are prescribed in s. 4. They are : (1.) that goodwill has become attached to the premises, (2.) by reason of the carrying on a trade at the premises by the tenant or his predecessors in title for a period of not less than five years ; (3.) that by reason of the attachment of goodwill the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto.

(1) [1930] 2 K. B. 197.

One would have expected a statutory definition of "goodwill," but Parliament was unable to frame one and left the matter to be determined by the Courts. I pointed out in *Simpson* v. *Charrington & Co., Ld.* (1), that Parliament must be taken to have been aware of the previous definitions of "goodwill," expressing in more precise language Lord Eldon's definition in *Cruttwell* v. *Lye* (2): "Nothing more than the probability, that the old customers will resort to the old place," even though the old trader or shopkeeper has gone. The result of this is, as was found in the special case in *Llewellyn* v. *Rutherford* (3), that premises themselves, owing to the old established and successful business carried on by the tenant, may acquire a special value which stays with them when the tenant leaves. This statutory goodwill was partially defined by one of the valuers in the present case as "everything which will remain in spite of the efforts of the outgoing tenant to take it away, ... a proportion of the profit which will remain attached to the premises after the tenant has gone and left them, taking with him what he can." Some of this "remaining profit" will have nothing to do with the tenant; for instance, the possibility of profit arising from the advantageous site of the premises, or from the growth of the neighbourhood, or the increase, in the case of garages, in the use of motor-cars. But some portion of the increased value of the premises to the landlord when the tenant leaves at the end of the term may be the direct result of the tenant's carrying on the business during the tenancy, and it is this portion that the landlord gains when the tenant leaves, in respect of which it was intended to compensate the tenant; because the landlord is gaining an increased value in the premises due directly to the work of the tenant, the probability of the old customer resorting to the old shop. While the tenant is trading, he has a further goodwill—the probability of the old customer resorting to the old trader. The value of this is not attached to the premises but to the person of the tenant, and the tenant can take this probability with him at the end

(1) [1934] 1 K. B. 64, 71.
(2) (1810) 17 Ves. 335, 346.
(3) L. R. 10 C. P. 456, 469.

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of his term. Oddly enough, however, Parliament has provided, by s. 4, sub-s. 1 (*d*) (i.), that the Court may award compensation on condition that the tenant shall not carry on the trade within a certain distance of the premises.

A division of the elements of goodwill was referred to during the argument, and appears in Mr. Merlin's book as the "cat, rat and dog" basis. The cat prefers the old home to the person who keeps it, and stays in the old home though the person who has kept the house leaves. The cat represents that part of the customers who continue to go to the old shop, though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant's trading. The dog represents that part of the customers who follow the person rather than the place; these the tenant may take away with him if he does not go too far. There remains a class of customer who may neither follow the place nor the person, but drift away elsewhere. They are neither a benefit to the landlord nor the tenant, and have been called "the rat" for no particular reason except to keep the epigram in the animal kingdom. I believe my brother Maugham has introduced the rabbit, but I will leave him to explain the position of the rabbit. It is obvious that the division of the customers into "cat, rat and dog" must vary enormously in different cases and different circumstances. The "dog" class will increase with the attractiveness and new accessibility of the tenant; the "cat" class with the advantages of the site; all sorts of variations may affect the "rat." But the statute has provided as the principal test the difference at the end of the term between the rent with the goodwill and without it. I understand this to mean: find the rental value which at the date of the expiration of the lease a new tenant would pay if there had been no previous business carried on there; compare this with the rent which a new tenant would pay for premises which have been the home of a previous and similar business for so many years. This increase of rent, if any, is the figure with which one has to start. If the landlord can get a higher rent by letting for an entirely different purpose he has not gained anything by the trade of the previous tenant. If the increase of rent at the end of the tenancy is due to more favourable circumstances with which the tenant has nothing to do, such as increase of population, change of character of neighbourhood, increased use of motoring, that increase of rent is not directly due to the trading of the tenant. If a new through road has been opened past the garage during the tenancy, increase of rental value due to that would appear not to be directly due to the trade of the tenant but to be exclusively due to site.

I am inclined to think, on reconsideration, that in *Simpson* v. *Charrington & Co., Ld.* (1), I attached too much importance to the views of the Court in *Llewellyn* v. *Rutherford* (2) as to circumstances not directly due to the tenant's activities. In the latter case, para. 31 of the special case found the well known practice in the transfer of licensed houses of the incoming tenant paying to the outgoing tenant, besides paying the rent to the landlord, a sum for the tenant's goodwill. A lease contained a clause that at its expiration all sums of money which could be procured for the goodwill of the business of a licensed victualler in respect of the premises from an incoming tenant should belong to the outgoing lessee. The premises were relet without any agreement as to the sum payable for goodwill, and the outgoing tenant claimed a reasonable sum in that respect from the landlord. The arbitrator to whom the case was referred stated a special case to ascertain the principles on which he should assess that sum, including the question whether he might consider change of neighbourhood and similar matters. The Court, while saying that the matter must be dealt with according to the ordinary practice of valuers of goodwill, certainly expressed an opinion that the valuer was not to trouble about change of circumstances. On consideration, I do not think that this decision is applicable to cases under the Landlord and Tenant Act, 1927, where the statute expressly provides that the compensation for goodwill must not exceed the addition of value to the holding which is determined to be the direct result of the carrying on of the trade by the tenant. Change of population or character of the

(1) [1934] 1 K. B. 64, 70.
(2) L. R. 10 C. P. 456.

business, or change in the value of the site, is not the direct result of the tenant's trading. I think, on reconsideration, the passage at page 70 of the report of *Simpson* v. *Charrington & Co., Ld.* (1), went too far in its reliance on the judgments in *Llewellyn* v. *Rutherford.* (2)

This being the statutory position, I proceed to consider how the referee, whose report the county court judge has adopted, has dealt with the matter. He begins with the unusual experience that the two opposing experts have agreed that the highest rental value that any tenant would give for these premises, a garage, with their trading history, is 550*l.*, and that the outgoing tenant offers to pay that sum for a new lease. The next question that he should consider is, what rent would a new tenant give for the premises now, if there were no goodwill attached to it. I do not think the referee expressly answers this question. The tenant did agree to pay, in 1919, 450*l.* a year plus a premium of 225*l.*, plus an obligation to execute certain alterations. The valuers appear to agree that this corresponded to a rent of 500*l.* a year, though the tenants' valuer said that the original rent in 1919 was much too high. On the other hand, the landlords' valuer said that all rental values in the neighbourhood had gone up a third between 1919 and 1932, and the tenants' valuer agreed that there had been some increase in values, though he did not agree the amount. If the landlords' valuer was right, 550*l.* rent in 1932 would have represented 410*l.* value in 1919, and as the tenant was ready in 1919 to pay 450*l.* for premises without goodwill, there was not left any room for an increase of value due to goodwill. The referee, however, does not seem to have assessed the rental value in 1932 without goodwill. He has, I think, at first followed the procedure of the tenants' expert. That valuer had (1.) declined to assess the value of the goodwill, which was a matter for an accountant; (2.) taken the amount of net profits, given him at 1200*l.*, without checking it; (3.) stated that if the profits were 1200*l.* the value of the goodwill would be 3000*l.*; that is to say, 2½ years' purchase of 1200*l.*; (4.) expressed his opinion that of that

(1) [1934] 1 K. B. 64, 70.

(2) L. R. 10 C. P. 456.

3000*l.*, the " cat " portion which would remain to the landlords was one-third, i.e., 1000*l.* The referee goes through a somewhat similar process in a different order. (1.) He assesses the profits at 750*l.*; (2.) he takes one-third of the profits (not, as the expert does, of the goodwill), i.e., 250*l.*; (3.) he takes 2½ years' purchase of that—" something over 600*l.*" It seems to me that neither of these processes is what the Act requires to be done; that is, to compare the rental value, with goodwill, and the rental value, without goodwill, taking care that he does not include in his result any amount not directly due to the trading of the tenants, or exclusively due to the situation of the premises.

The referee's next step, however, I do not understand. He endeavours to ascertain what amount of value is due to causes irrespective of the tenants' trade. He arrives at this sum by comparing the rental actually paid by the old tenant, 500*l.*, and the agreed rental with goodwill, 550*l.*, and comes to the conclusion that 50*l.*, the result, is the sum due to causes other than the tenants' trading. Why this should be so I cannot understand. The 50*l.* would seem to be the increase due to the tenants' trading. But having got this figure, he finds that 14¼ years' purchase of it is over 700*l.*, which is more than the 600*l.* capitalized rental value retained by the landlords, and then decides that no compensation is payable under s. 4 of the Act. I am quite unable to follow this process, and it seems to have no relation to the measure of compensation prescribed by the Act. If in the elements of the rental value the sum retained by the landlord is less than the value due to causes extraneous to the tenant's trading, this cannot prevent the tenant from having given by his trading a value to the premises which the landlord will retain at the end of the lease.

The whole process seems to be not the measure of compensation prescribed by the Act, as explained in this judgment, and the case must be remitted to the county court judge to assess compensation on the correct and statutory measure. He must commence by comparing the rental value in 1932, with goodwill, i.e., the benefit accruing to the premises from the old tenants' trading, which the experts agree at 550*l.*, and the rental value in 1932 of the premises without any previous trading. I do not myself see that the previous profits of the old tenants have much to do with this question. Whatever they are, the old tenants are not willing to give more than 550*l*. for a new lease of the premises, and the new tenant without goodwill is not concerned with a previous trading which is hypothetically non-existent, but with what he thinks he can make out of the premises, starting in them a business previously non-existent.

If the county court judge should find compensation due to the tenant under s. 4, he then has to consider the tenants' claim to a new lease under s. 5. This is not dealt with by the referee or county court judge, because they found no compensation due, and it is impossible for this Court to say anything useful about it, except this : s. 5 contemplates that the tenant may prove that he would lose by moving to other premises at the end of the lease, not only the " cat " element of goodwill, but also the " dog " element, in that his old customers do not go with him to his new premises. This seems to me to raise difficult questions as to prophetic facts, and also difficult questions of construction. It is not clear to me how, if there is a loss of " dog " customers, the compensation for loss of " cat " customers can be sufficient to make up for that loss, for the " cat " compensation excludes any loss of " dog " customers. I am retaining the phrases " cat " and " dog " to avoid repeating the definition of these terms given above, and I only call the attention of the county court judge to the matter in order that, if it is necessary for him to consider the grant of a new lease, he may also consider this aspect of it.

The appeal must be allowed with costs and the case remitted to the county court judge to reconsider it, on the lines of the judgments of the Court. The costs before the referee will be costs in the cause, and the costs of the first hearing before the county court judge will follow the result of the second hearing, with liberty to apply to us in case there is any difficulty on this point.

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WHITEMAN SMITH MOTOR CO. v. CHAPLIN.

Maugham, L

MAUGHAM L.J. This appeal raises questions as to the proper method of determining the compensation, if any, payable to a tenant for goodwill under s. 4 of the Landlord and Tenant Act, 1927, and as to whether the tenant has a right in the circumstances to a new lease pursuant to s. 5, a right which can only arise if the tenant would be entitled to compensation under s. 4. The application is by tenants of premises occupied as a motor garage, repair works, and petrol filling station carried on by them and their predecessor in title for nearly 14 years. The facts are fully stated in the report of the learned referee, and I do not think it necessary to repeat them.

There is no difficulty in stating in general terms the conditions on which the tenant would be entitled in a normal case to compensation under s. 4: the difficulties that arise are in connection with the precise meanings to be attached to the words and phrases used in the Act, and this vagueness is apt to be reflected in the reports of referees, and even in the judgments of the Courts. I shall endeavour, in an effort to avoid obscurity, first to state the general principles, applicable in such a case as the present one, in a series of propositions. I shall describe as "the normal rent" the rent which "a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises, having regard to the terms of the tenancy, but irrespective of any goodwill which may have become attached to the premises" by reason of the trade or business of the tenant or his predecessors. The rent which could be obtained with the goodwill I shall call "the goodwill rent."

1. The Act is plainly designed to prevent the landlord at the end of the tenancy from obtaining without payment the benefit of a goodwill created by the tenant, the nature of the benefit being his power of letting the premises for the goodwill rent.

2. The limit of the compensation is the addition to the value of the premises in the hands of the landlord at the end of the tenancy: see *Hudd* v. *Matthews*. (1)

3. The addition to the value of the premises must, however,

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(1) [1930] 2 K. B. 197.

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be the direct result of the carrying on of the trade or business by the tenant or his predecessor, and any value attributable exclusively to the situation of the premises must be excluded. The second half of this sentence follows from the first, and the provision was inserted ex abundanti cautela. See *Simpson* v. *Charrington & Co., Ld.* (1) For the same reason, an addition to the value due to an increase in population or a change in trading conditions, or a shortage of suitable premises, or other like conditions, must also be excluded. It may be added that the value dependent on or derived from the site was inherent at the beginning of the tenancy, even if it was then unrecognized, and is not due to the trading of the tenant.

4. The only kind of goodwill which can be an addition to the value of the premises in the hands of the landlord is that kind which has become attached to the premises, irrespective of their position, and which would naturally be reflected in a higher rent payable by a person carrying on a similar business. It may be greatly diminished if the tenant is able to obtain premises in the neighbourhood, and this possibility has to be considered: see s. 4, sub-s. 1 (ii.) (*d*) (i.). Whilst it is obvious that profits due to the reputation of the proprietor or to the personal skill or ability of the persons or the assistants employed in the business must be excluded, it should be pointed out that there is not necessarily any such goodwill as that referred to in the last paragraph, even if the personal goodwill is excluded, since that which surveyors and referees sometimes call adherent goodwill (referred to later in connection with the metaphor of a cat) may be largely or wholly due to the custom of persons who come to the premises simply because of their proximity, or because they lie on a line of route which the customers frequent. If the term "adherent goodwill" is used, it is essential to define it. I shall use the phrase "net adherent goodwill" as meaning the goodwill, if any, which will remain attached to the premises, not including the "site goodwill," that is, irrespective of customers who would come to a new tenant, starting a new business, simply because of their convenient situation. In a

(1) [1934] 1 K. B. 64.

sentence it is important not to confuse site goodwill, which is inherent, with net adherent goodwill. In my opinion a confusion of these two things is responsible for some of the obscurity in the report.

5. It follows that the real question to be answered is: What is the addition to the value of the premises in the hands of the landlord by reason of the "net adherent goodwill"? This is in effect the same thing as saying that the compensation to which the tenant would be entitled is the difference, if any, between: (*a*) the value of the reversion if the landlord were to let the premises at the goodwill rent, i.e., for the purpose of the same business as that which the tenant has carried on, and (*b*) the value of the reversion if he let the premises at the normal rent.

6. The most favourable lease which the tribunal in its discretion can give the tenant under s. 5, sub-s. 2, is a lease at what I have defined as the normal rent: see the proviso to sub-s. 2. This confirms, if it was necessary, the view that the tenant does not get the benefit of any increase in the value of the premises arising from an increase in population or a change in trading conditions or a shortage in suitable premises for his trade or business.

I will now add a word on the picturesque attempt to divide the value of the goodwill by describing it as consisting of three elements, named respectively the cat, the rat, and the dog values—the cat describing the value of the goodwill remaining with the premises after the tenant and his assistants have gone. To my mind this division, except as an illustration, is of little value, and may be misleading. In the first place, the tenant, if and when he goes to premises not far off, can circularize or advertise for his old customers, and their custom may be attracted away to an extent dependent on his nearness to his old premises and the customers' appreciation of the way in which they were served in the past. This is a matter on which the opinion of a valuer can be worth very little, unless he knows the tenant, his assistants, and the customers personally. In the second place, and this is a more important point, the so-called "cat" goodwill must in a large and uncertain measure be due simply

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to the site of the premises which the Legislature has told us to exclude from the consideration. If the cat metaphor is to be used, I would say that the cat may be attracted away by a gentle stroke on the back and the promise of a bowl of milk. But really there should be a fourth animal, the rabbit, to indicate the customers who come simply from propinquity to the premises ; and, if this is borne in mind, it will be apparent that the rabbit may be much bigger than the cat, who (if indeed it does not wholly vanish) may well shrink to the dimensions of a mouse.

For these reasons I regard the arbitrary division into thirds of the goodwill into cat, rat, and dog goodwill as valueless unless all sorts of qualifications are made. The plaintiffs' valuers suggested that 1000*l*. was the value of the goodwill attached to the premises, the " cat " goodwill ; but how much of that was due simply to the custom of persons who live close by and who garage their cars at the premises for that reason, or who come there merely because the place lies on a road which they constantly use, he did not, and, of course, he could not, say. Nor did he make any qualification as to the effect on the 1000*l*. of the propinquity of premises which the tenants might obtain in addition to their present premises in Lonsdale Road and Belsize Lane.

Some observations on the evidence which may be adduced on such an inquiry as we have embarked upon may be useful.

The tenant naturally starts by giving evidence as to the profits which he has earned from the business during the term. It is obvious that these profits form a very slight guide to the value of the adherent goodwill, since they may depend largely or entirely on the skill, the reputation, or the personal qualifications of the person or persons who have carried on the business, or they may be attributable solely to the advantages of the site or to improved trade conditions. The preliminary questions for the referee are to determine on the evidence of surrounding circumstances and of experts whether there is any real goodwill, and what proportion, if any, of the profits may be expected to accrue to a new tenant, carrying on the same business, by reason of the trade with old customers who will continue (on the assumption of reasonably good management) to come to the premises, and who would not naturally come there but for their previous visits. In other words, what is the value of the net adherent profits as above defined? This question must often be a very difficult one to answer otherwise than by an intelligent guess. When it has been answered by a finding, say, that profits of the extent of *xl.* per annum may be expected to "adhere" in the true sense, the next question will be as to the effect of the finding on the rent which might be obtained by the landlord (with the adherent goodwill), i.e., the goodwill rent. Clearly the tenant will not, generally speaking, allow *xl.* to be added to the rent, since the figure will appear to him to be of a very problematical value, and in many cases he will not give anything for it.

Businesses and trades vary in an extraordinary degree. The mere fact that profits, whether steady or increasing, have been earned for a number of years, does not by itself establish any claim for net adherent goodwill, and, accordingly, those facts alone do not establish that "the premises could be let at a higher rent than they would have realized had no such goodwill" as is referred to in s. 4, sub-s. 1 (ii.), "attached thereto." Any trading premises in a suitable position, established with sufficient capital, and managed with reasonable skill, are capable of earning moderate profits at once if trading conditions are not abnormally bad. The real comparison, as already stated, is between the value of the premises at the end of the lease, (*a*) for the same business, and (*b*) for any other business, or for the same business as that carried on by the tenant on the hypothesis that it is being started for the first time. The latter alternative would have to be considered if the premises in practice are particularly suitable, as in this case, for the same business as that carried on by the tenant (for example, a cinema house, an inn, a shop of a special kind, or premises so placed that the site determines their most profitable mode of use).

On the other hand, as has been decided by the Court of Appeal in the case of *Simpson* v. *Charrington & Co., Ld.* (1), it is not necessary to prove that the tenant has done more than any tenant of ordinary capacity and energy would have done.

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(1) [1934] 1 K. B. 64.

It has been suggested that the amount of the compensation may be determined by comparing the value of the premises at the commencement and at the end of the lease; but I must express the view that this comparison will furnish a very unsafe guide. The increased value of the premises at the end of the lease may be wholly independent of "the direct result of the carrying on of the trade or business": s. 4, sub-s. 1 (ii.) (*d*).

I should here add that, in my opinion, the question before the Court in *Llewellyn* v. *Rutherford* (1) was a very different one from that which confronts the Court under the Landlord and Tenant Act, 1927. For reasons already given, I think it is clear that under s. 4 of that Act changes in the neighbourhood or in the nature of the trade, not being the direct result of the carrying on of the trade, must be disregarded in determining the increment in value of the premises at the end of the term.

Turning now to the report, as I understand it, the yearly average amount of the "adherent profit" which the referee in this case has taken as not more than 250*l.* (being one third of the supposed net profits of 750*l.*) was an amount ascertained without excluding profits due to "causes irrespective of the tenant's trade or business." It was not what I have defined as net adherent profit, and it seems evident to me that this figure of 250*l.* bears no relation to the figure we really want, which is the addition to the value of the holding determined to be the direct result of the carrying on of the business, and therefore irrespective of site. Profits alone, as I have pointed out, do not establish a net adherent goodwill. If the annual value (with goodwill) of the premises has gone up from 500*l.* to 550*l.* or 600*l.*, that by itself proves nothing, for the addition of 50*l.* or 100*l.* to the rental value may be due to causes irrespective of the tenants' trade. The only goodwill with which s. 4 is concerned is, I repeat, a goodwill which causes an addition to the value of the holding. That postulates that the premises will be more valuable by reason of the tenants' trade than they

(1) L. R. 10 C. P. 456.

would be but for such trade, that is, after making all necessary deductions for an appreciation in value due to causes irrespective of the tenants' trade. The figure of 750*l*. is, in my view, useless, unless it can be compared with a figure showing what the annual profits would have been if the trade were just beginning, and, even so, would be only an element to be considered in fixing the increment in annual value found to be the direct result of carrying on the business.

The county court judge has accepted the whole of the findings and conclusions of the referee, and he has accordingly entered judgment for the defendants with costs. The Court, therefore, has to treat the report of the referee as disclosing the grounds for the decision of the county court judge, but my first difficulty is that I am unable from that report to understand what the referee has really done. It may be conceded that, if the referee was satisfied that no compensation was payable under the Act, precise figures were unnecessary; but I have a difficulty in following the way in which he has arrived at such a conclusion. Towards the end of his report he begins to consider "the average yearly amount of 'adherent profit,'" that is, he says, "of profit which, to employ a common legal phrase, 'runs with the land' or premises, and which alone is to be taken into consideration in estimating the amount of compensation payable for goodwill under the Act." This cannot be the net adherent profit which is the direct result of carrying on the trade or business, disregarding any value attributable exclusively to the situation of the premises and disregarding any value due to increase of population or to the increased use of motor-cars or other circumstances irrespective of the efforts of the tenant. He then proceeds to capitalize at 2½ years' purchase his so-called adherent profit (which includes the inherent profit) and to deduct from what he calls "the capital value of the adherent profit," the capital value estimated on a 7 per cent. table of the increase in annual rental value due to causes irrespective of the tenant's trade or business. I see no reason for capitalizing the yearly value either of the gross or of the net adherent profit. The landlord is not purchasing, nor is the tenant selling, the goodwill. In my opinion, the right and necessary step ought to have been to dissect the figure of so-called "adherent profit" and to ascertain the net adherent profit, if any, directly due to the tenants' trade for a number of years. The annual value or amount of the net adherent profit, if any, ought to be used simply for ascertaining the addition to the lettable value of the premises. And as I have already pointed out, the addition to what I call the normal rent due as a direct result of the carrying on of the trade is not the net adherent profit but the increased rent which it is thought a tenant will pay who is to get the benefit of the true adherent goodwill. It seems to me essential to ascertain this addition, if any, to the value of the holding determined to be the direct result of the trade except in one case where a short cut is possible—namely, if the tribunal is satisfied that the goodwill rent and the normal rent are substantially the same, there is no need to go any farther.

For the sake of clearness, I will state that in my judgment the method adopted by the referee of deducting from the capital value of the (gross) adherent profit the capital value of the increase in the annual rental value which is due to causes irrespective of the tenant's trade or business is fundamentally wrong.

The referee, in the last page of his report, seems to me to have appreciated the correct method of dealing with the question; but, unfortunately, he says in effect that no evidence was forthcoming as to what I have defined as the normal rent, for, if I correctly understand the preceding page, he accepted 550*l*. as being the amount of the goodwill rent. I would observe that he might perhaps have got at the normal rent by ascertaining the fair rent at the beginning of the tenancy and making an addition to that figure for the general appreciation in rental values of trading premises in the immediate vicinity. That, of course, was a matter for him to decide, and it may be that there was an objection to it. But I cannot satisfy myself that he has followed this line of reasoning. It seems to me that his conclusions are due, or mainly due, to his method of ascertaining the capital value of what he calls "the adherent profit," and then deducting the supposed capital value of an increment of 50*l.* a year due to causes other than the trade. Accepting his figures (which I must admit I do not altogether follow) the process is, in my opinion, wrong in principle, and the case must accordingly be remitted to the county court judge for reconsideration.

If the county court judge should find that the tenant is entitled to compensation under s. 4, he will then have to consider the tenants' claim for a new lease under s. 5. It is, I think, clear that the loss of goodwill which the tenants allege they will suffer, referred to in s. 5, sub-s. 1, is not limited to the adherent goodwill referred to in s. 4 of which the landlord is presumed to get the benefit if the lease is determined ; and no doubt in almost every case where the tenant is entitled to compensation under s. 4 he will be able truly to make the allegation referred to in s. 5, sub-s. 1. It does not, however, follow that the tribunal will order the grant of a new tenancy, even if it is not precluded by one of the specific grounds mentioned in the section. That is a matter for the discretion of the tribunal, after taking into consideration all the circumstances of the case. Those circumstances will doubtless include the amount of loss suffered, as alleged by the tenant, over and above the compensation he is entitled to, his behaviour and character as a tenant, his prospects of getting premises in the neighbourhood, the interests of the landlord, and any other circumstances which appear to be proper for consideration. This is one of the cases where, according to a modern practice (which began, I think in 1893), the Legislature has thought fit to confer a wide discretion on the Courts without indicating in any way the lines on which it is to be exercised, and I do not think it safe to attempt any further indications of how that discretion should be exercised, except that it is to be remembered that the lease, if granted, may be for any term up to fourteen years, and on such terms as the tribunal may determine to be proper.

Appeal allowed.

Solicitors for the plaintiffs : *Bertie F. Browne.*
Solicitors for the defendants : *Lea & Lea.*

T. W. M.

Applied. MINT *v.* GOOD
[1951] 1 K. B. 517

1934
Feb. 26, 27;
March 6.

WILCHICK *v.* MARKS AND SILVERSTONE
(SILVERSTONE, THIRD-PARTY).

[1933. W. 2220.]

Highway — Premises adjoining — Landlord and Tenant — No contractual liability to repair on owner or occupier—Nuisance arising from non-repair —Knowledge of owner—Liability of owner and occupier for injury to persons using the highway.

The plaintiff was walking along a highway when she suffered personal injury by the fall of a defective shutter from a house abutting on the highway. The premises were owned by the defendants A. S. and J. S., by whom they had been let, since 1914, to the defendant M. on a weekly tenancy. The original rent of 35*s.* a week had been from time to time increased as permitted by the Rent Restriction Acts to 2*l.* 13*s.* 8*d.*, the increases including the percentage allowed on the basis that the landlords were responsible for the whole of the repairs.

The tenancy was oral, except so far as its terms were contained in the rent book, and, as the judge found, there was no contractual liability on either landlords or tenant to repair, though the rent book contained a clause reserving to the landlords the right to enter and do repairs if they thought fit. The defective condition of the shutter had been known to the tenant for a considerable time, and he had, as the judge found, informed the landlords of it.

The plaintiff brought her action against the landlords and the tenant, alleging a failure by both, or alternatively by one or the other, to keep the shutter in a secure condition so that it would not fall and injure passers-by. The tenant issued a third-party notice against his co-defendants claiming to be indemnified by them if he should be held liable to the plaintiff:—

Held, (1.) that the landlords were not estopped by having increased the rent on the basis of their doing the repairs from denying that they were liable, as against the tenant, to repair. In the absence of any contractual liability, the landlords, though they might do, and in fact did, repairs, were not bound to do them, nor to indemnify the tenant if he were held liable for non-repair. The third-party proceedings therefore failed.

Dicta of the majority of the Court of Appeal in *Morgan* v. *Liverpool Corporation* [1927] 2 K. B. 131 applied.

(2.) That though the landlords were under no contractual liability to the tenant to repair, yet, having reserved the right to repair, there was a duty on them, arising from proximity, to prevent injury to persons using the highway from a nuisance on the premises of which they had knowledge, and that they were therefore liable to the plaintiff.

Principle laid down by Abbott C.J. in *Laugher* v. *Pointer* (1826) 5 B. & C. 547 at p. 576 applied.

(3.) That the liability of the landlords did not exclude the liability of the tenant for a nuisance on premises occupied by him, and that he also was liable to the plaintiff.

NEW PROCEDURE ACTION tried before Goddard J.

The plaintiff, Miss Golda Wilchick, an infant suing by Israel Wilchick, her next friend, claimed damages for personal injury caused by a nuisance existing at 16, Sidney Square, Stepney, of which the defendant Marks was the occupier and the defendants A. Silverstone and J. Silverstone were the owners. In the alternative the plaintiff based her claim on the alleged negligence or breach of duty of the defendants or of one or more of them.

On March 4, 1933, the plaintiff was walking along the highway on which 16, Sidney Square abutted, when a shutter fell from a window of the premises and struck her on the head, causing serious injuries.

The facts as found by Goddard J. (which are more fully set out in his judgment) were that Marks had been a weekly tenant of the Silverstones since 1914, the rent being originally 35*s.* a week. That rent had been from time to time increased by the maximum amount allowed under the Rent Restriction Acts, where the landlords were responsible for the whole of the repairs, till at the time of the accident it was 2*l.* 13*s.* 8*d.* weekly. There was no contractual obligation to repair either on the landlords or the tenant, but an entry in the rent book reserved to the landlords the right to enter and do repairs if they thought fit.

Marks became aware of the defective condition of the shutter at the end of December, 1932, and informed the Silverstones' agent of it early in January, when he promised to see to it, but failed to do so.

All the defendants denied liability, and Marks issued third-party proceedings against his co-defendants, claiming to be indemnified by them if he should be held liable to the plaintiff.

Monckton K.C. and *Avgherinos* for the plaintiff. The liability of the tenant, as the occupier in immediate control of the premises, is not necessarily exclusive of liability in the landlord. There is ample authority for the proposition that where a landlord has covenanted with his tenant to do repairs,

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and has failed to do so, he may be liable in tort to third persons. (They cited *Payne* v. *Rogers* (1), *Todd* v. *Flight* (2), *Pretty* v. *Bickmore* (3), *St. Anne's Well Brewery Co.* v. *Roberts*. (4)) It is submitted that on the facts there was an express contractual liability ; but even if the Court is against us on that, the landlords may still be liable on the basis that by not doing the repairs which they reserved the right to do they authorized the nuisance.

H. I. P. Hallett for the tenant. It appears from the side note to *Payne* v. *Rogers* (1), that if the landlords are liable, the liability of the tenant is excluded. The tenant may rebut the presumption of liability for the consequences of a nuisance, based on his prima facie control of the premises, by showing that the control has in fact been passed to the landlords who have contracted to do the repairs. (See per Collins M.R. in *Cavalier* v. *Pope*. (5)) It is submitted that the facts of this case show an express contract between landlords and tenant that the landlords should do the repairs. Even if such an agreement was not expressly made it should be implied from the fact that the landlords had done the repairs for twenty years before this accident, and from the further fact that they have raised the rent by the maximum amount permitted on the basis that they are responsible for the whole of the repairs.

Alternatively, having made those increases on that basis, having in each case served on the tenant the statutory notice showing that the increase was made on that basis, and having in fact done the repairs, the landlords are now estopped from denying that they were obliged to do them. *Morgan* v. *Liverpool Corporation* (6) is distinguishable ; the Court of Appeal there were not considering the point of estoppel, and the dicta of the majority (from which Lawrence L.J. dissented) that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, did not impose on the landlord any duty to repair which was not to be found in the original

(1) (1794) 2 H. Bl. 350.
(2) (1860) 9 C. B. N. S. 377.
(3) (1873) L. R. 8 C. P. 401.
(4) (1928) 44 Times L. R. 703.
(5) [1905] 2 K. B. 757, 762.
(6) [1927] 2 K. B. 131.

lease, were obiter, and should not be treated as binding in the present case.

On the facts of this case, another estoppel arises, since the landlords, according to the tenant's evidence, were informed by him of the defective condition of the shutter, and expressly promised to repair it. The consideration for that promise was the tenant's consent to continue the tenancy. On the faith of the landlords' promise to repair the shutter, the tenant took no steps to repair it himself, and the landlords therefore cannot be heard to say, after the liability has arisen, that they were under no liability.

Monier-Williams for the landlords. The occupier of premises cannot divest himself of his primary liability. He may in certain circumstances be able to establish a joint liability in the landlord, where the latter is under a liability to do repairs. But to make the landlord liable to third parties there must be a legal liability of the landlord to the tenant, either by statute or contract. Here there is no liability by statute, the premises being outside the scope of the Housing Act, 1925, s. 1.

As to contractual liability, this is one of the very numerous cases where neither party has contracted to do the repairs. A mere reservation by the landlords of a right to enter and do repairs does not create a legal liability to do so, which the tenant could enforce against them. It is a mere right to do what they think fit for the preservation of their own property.

In *Payne* v. *Rogers* (1) the landlord who was held liable to a third party was contractually liable to the tenant, and the case is therefore distinguishable. In *Nelson* v. *Liverpool Brewery Co.* (2) Lopes J. stated that: "We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier and the occupier alone being prima facie liable: first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner." Neither of those conditions is present in this case. In *Pretty* v. *Bickmore* (1) the tenant was held liable for a nuisance because he was under a contractual liability to repair. The landlord was held not liable because he was not liable to repair.

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(1) (1794) 2 H. Bl. 350. (2) (1877) 2 C. P. D. 311, 313.

There is no estoppel by the increases of rent. It is true that the dicta in *Morgan* v. *Liverpool Corporation* (2) were technically obiter, but the question of the effect of such increases was fully argued and specifically dealt with in the judgments of the Court of Appeal. The effect of that decision is that the increases of rent by the landlords do not amount to a representation that they are under a contractual liability to repair, and without such representation there can be no estoppel.

Even if the landlords were contractually liable to repair, that liability could only arise on notice to them of disrepair, and it is submitted that there was in fact no such notice given to them.

Avgherinos in reply. In *Pretty* v. *Bickmore* (3) Keating J. said, that the basis on which the landlord could be liable was "that he authorized the continuance of the nuisance" (see also Salmond on Torts, 7th ed., pp. 278–9). A contract by the landlord to repair is merely evidence of authorization, but authorization may be established by other evidence. Here there was express reservation by the landlords of the right to enter and do repairs, coupled with actual repairs done over a period of twenty years. On the facts, it is submitted that they had notice of the defect, and that in these circumstances there was such authorization of the nuisance as to make them liable.

It is submitted that, whatever the position between landlords and tenant, both the defendants owed a duty to persons using the highway, and both are liable for injuries resulting to such persons from a nuisance on premises adjoining the highway.

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(1) L. R. 8 C. P. 401.
(2) [1927] 2 K. B. 131.
(3) L. R. 8 C. P. 401, 405.

Cur. adv. vult.

March 6. Goddard J. read the following judgment. On the night of March 4, 1933, Miss Golda Wilchick, a young sempstress who earned as a piece worker an average of 25*s.* a week, was walking with a friend past 16, Sidney Square, Stepney. This house is owned by the defendants Silverstone, who are large property owners in the East End, and is occupied by the defendant Marks, as a weekly tenant. He is a tailor in a small way of business and pays a rent for the house and workshop of 2*l.* 13*s.* 8*d.* a week.

As the plaintiff was passing, Marks' son was closing the wooden shutters across the window of the front ground floor room and one of them fell on the plaintiff and stunned her. It fell because the top hinge was broken and had drawn out from the wall, and it had been in a defective condition to the knowledge of Marks since the last days of the previous December. The accident had results more unfortunate than might have been expected. The plaintiff suffered serious injury, and it is evident that it must be some time before she can lead a normal life. She has lost a year's earnings 65*l.* : she has incurred some 6*l.* 14*s.* 6*d.* for doctor's fees, and I think that a fair sum at which to estimate her damages is 271*l.* 14*s.* 6*d.*

She brings this action against both occupier and owners, alleging a failure by both, or alternatively by one or the other, to keep the shutter secure so as not to fall on and injure passers by. She alleges that there was a duty on the owners to repair, and alleges an express contract by them with their tenant to that effect. In this she is supported by the tenant, who has taken third-party proceedings in the action against the owners claiming indemnity from them if he is held liable. He alleges that the sole duty of repair was on the owners and that he is under no liability at all. The owners deny that they were under any obligation to the tenant to repair and say that they having let the property by the week to Marks, he alone is liable for any nuisance that may be caused by the premises being out of repair; moreover, they deny that they had any notice or knowledge of the shutter being out of repair.

The facts that I find with regard to the tenancy are these: Marks became the tenant of his co-defendants in March, 1914, and has remained there as a weekly tenant ever since. The original rent was 35*s.* a week and has been increased as permitted by the Rent Restriction Acts from time to time to the present rent of 2*l.* 13*s.* 8*d.* The increases include the full amount which the landlords are entitled to charge on the basis of the liability for repairs being theirs. The requisite statutory notices were duly served from time to time. The terms of the letting, except in so far as they were contained in the rent book, were oral and both the plaintiff and Marks sought to prove that it was expressly agreed at the outset of the tenancy that the repairs should be done by the landlords. I listened with care to the evidence of Marks and of Jacob Silverstone: it is clear that something was said about repairs at the time of letting; it is equally clear that the landlords have from time to time done repairs to the premises at their own expense, but I am satisfied that there was no contract by the landlords with the tenant to do any repairs at all. The tenant was told that he was not required to repair: he may have been told, and I think very probably was, that if anything was necessary the landlords would do it. They would naturally take what steps they thought fit to preserve their property and also, I suppose, to keep it in a state that would satisfy the sanitary authority, but I am clearly of the opinion that they did not as a matter of contract bind themselves to repair any more than they put an obligation on the tenant. The matter was left as it is in the vast majority of lettings of this small class of property, as it was, for instance, in *Morgan* v. *Liverpool Corporation* (1), where Atkin L.J. said: "in the bulk of the cases which come within the Increase of Rent, etc. (Restrictions), Act the landlord is under no contractual obligation to the tenant to do any repairs at all."

(1) [1927] 2 K. B. 131, 148.

But in the terms of tenancy appearing in the rent book I find that it is provided that "the landlord, his agent or workmen shall have permission to enter the premises at any reasonable hour to inspect same or execute any necessary repairs," showing that they reserved to themselves the right of doing repairs to the premises and to that extent, at any rate, exercised a measure of control over them for this purpose. Contractually, therefore, the position was that neither landlords nor tenant were bound as against the other to repair at all, but the former reserved a right to enter and do repairs, the measure and nature of which was left to their discretion.

The next matter to deal with is whether the landlords knew that this shutter was out of repair. [His Lordship discussed the evidence on this point, and found as a fact that the landlords did know.]

Before dealing with the principal and most difficult part of the case I propose disposing of two points made by Mr. Hallett in support of his contention that there was an obligation on the Silverstones towards Marks to repair independent of an express term of the tenancy. He contends that having raised the rent by the amount of 40 per cent. as permitted by the Rent Acts where the landlord undertakes repairs, and having served the statutory notices which state that the increase is made on that footing, the landlords are estopped from denying that they agreed to repair. The difficulty, however, in his way is that in *Morgan* v. *Liverpool Corporation* (1) the majority of the Court of Appeal held that the Rent Acts did not alter or enlarge the contract between landlord and tenant, and that the raising of rent by the statutory maximum did not import an agreement to repair which was not in the original letting. It is true that Atkin L.J. pointed out that this part of his judgment and that of the Master of the Rolls was technically obiter, as the case was actually decided on lack of notice, but the point was argued and dealt with at some length by all the members of the Court, Lawrence L.J. being of a different opinion. Whatever conclusion I might have come to but for that case I think

(1) [1927] 2 K. B. 131, 148.

it is clearly my duty to follow the opinions expressed, though they are not technically binding on me. But Mr. Hallett also contended that the point of estoppel was not considered by the Court nor is there any reference in the argument or judgments to the terms of the notices which have to be served as a condition of the increase. But I cannot assume that this point escaped the Court even though it be not expressly mentioned in the judgment; and moreover, if the fact that the rent is raised does not effect a variation of or addition to the contract, I cannot see how the service of notices which is a condition precedent to raising the rent can affect the contract either of itself or by way of estoppel. This contention therefore fails. His next point is that as the landlords' agent promised in January that he would repair the shutter he led Marks to believe that it would be done, that Marks accordingly refrained from doing it and thereby altered his position, and so another estoppel is raised. He also contended that the landlords contracted by their agent to do the repair, the consideration being that Marks would continue his tenancy. In my judgment there is nothing in either of these points. The plain fact is that Marks regarded the matter as the landlords' affair and not his. I do not believe it ever crossed his mind that he might incur liability to any one by its remaining out of repair; and I am sure he never contemplated giving notice. He had no intention, nor had the Silverstones, of making any contract about it, nor did he alter his position in any way. Having told his landlords' agent about it he left it to him.

Having, therefore, decided that there was no agreement between landlords and tenant as to repairs, but that the former knew that there was adjoining the street a defective shutter on premises over which they had reserved the right to enter and do repairs, the question is whether the plaintiff has a right of action against the landlords or must be left to what I fear is but a barren remedy against the tenant. Mr. Monier-Williams has strenuously argued that unless a landlord has bound himself by contract with the tenant to do the repairs he is under no liability to a passenger on the highway who may be injured by the premises getting into a condition amounting to a nuisance owing to disrepair, and, as I understand the argument, that it is immaterial whether he knew of this condition or not. The question is one, I venture to think, of some difficulty, and involves a consideration of a considerable body of case law which has formed the subject of comment by leading text writers on the law of torts. I pause here to say that no question arises as to the landlords having knowingly let the premises in a ruinous condition. It is now well settled that in a weekly or other periodic tenancy there is no reletting each week or month as the case may be. See *Bowen* v. *Anderson* (1) and the reported but undelivered judgment of the Court of Exchequer Chamber in *Gandy* v. *Jubber*. (2) The tenancy here had existed for some twenty years and the matter complained of was of very recent origin.

Sir F. Pollock in his work on Torts—I quote from the 13th ed., p. 448, says: "If the landlord has not agreed to repair, he is not liable for defects of repair happening during the tenancy, even if he habitually looks to the repairs in fact." For this proposition the learned author cites *Nelson* v. *Liverpool Brewery Co.* (3) and refers also to *Rich* v. *Basterfield* (4) and *Lane* v. *Cox*. (5) But I do not think these authorities are decisive of this case. *Rich* v. *Basterfield* (4) was a case of a tenant himself creating a nuisance (in that case by smoke) by the manner in which he used the premises, which could have been used without creating a nuisance. The landlord therefore had done nothing wrong. *Nelson's* case (3) and *Lane's* case (5) both relate to injury caused to invitees on premises which the landlord was under no liability to the tenant to repair. There is nothing wrong in letting unfurnished premises which are out of repair, and as in such a case the landlord owes no duty to the occupier, who takes the premises at his own risk, it follows he is under no duty

(1) [1894] 1 Q. B. 164.
(2) (1868) 9 B. & S. 15.
(3) 2 C. P. D. 311.
(4) (1847) 4 C. B. 783.
(5) [1897] 1 Q. B. 415.

to persons whom the tenant invites to come there. *Cavalier* v. *Pope* (1) is another instance of the same doctrine. What is the principle that determines the liability for nuisance; why is it that prima facie it is the occupier who is liable? In *Laugher* v. *Pointer* (2) Abbott C.J. said: "I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another." In the same case Littledale J. stated the principle thus: "Where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured." (3) The first case in which a landlord was made liable for a nuisance arising during the tenancy is *Payne* v. *Rogers* (4), the ground of the decision being apparently that the landlord was under an obligation to his tenant to repair.

This case has been approved in *Rex* v. *Pedly* (5); *Todd* v. *Flight* (6); *Pretty* v. *Bickmore* (7) and *Nelson* v. *Liverpool Brewery Co.* (8) and establishes that where the landlord has assumed an obligation to repair, he is liable to a person injured through disrepair, though to that must be now added that the plaintiff must prove that he had knowledge of the state of disrepair—see *Morgan* v. *Liverpool Corporation* (9); *St. Annes Well Brewery Co.* v. *Roberts.* (10)

If a landlord lets premises on which he knows that a nuisance exists but takes a covenant from his tenant to put or keep them in repair, no liability remains in him—*Pretty* v. *Bickmore* (7) and see per Brett J. in *Gwinnell* v. *Eamer* (11), but there is no case which precisely covers the present facts, where, neither landlord nor tenant being under covenant to repair, the former reserves the right to enter and do necessary repairs and, knowing that repairs are necessary, fails to do them.

Clearly if the plaintiff had been a visitor to the premises she would have had no cause of action against the landlords,

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(1) [1905] 2 K. B. 757; [1906] A. C. 428.
(2) 5 B. & C. 547, 576.
(3) Ibid. 547, 560.
(4) 2 H. Bl. 350.
(5) (1834) 1 Ad. & E. 822.
(6) 9 C. B. N. S. 377.
(7) L. R. 8 C. P. 401.
(8) 2 C. P. D. 311.
(9) [1927] 2 K. B. 131.
(10) 44 Times L. R. 703.
(11) (1875) L. R. 10 C. P. 658.

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as no duty was owed to visitors by the landlords any more than to the tenant. The duty in such a case arises only from contract, but why may there not be a duty apart from contract to persons who are on the highway? If I use a highway the duty I am under not to injure other persons is not special or contractual, but general, arising from what Lord Esher used to call proximity. A property owner knows that his house if not repaired must at some time get into a dangerous state: he lets it to a tenant and puts him under no obligation to keep it repaired: it may be the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs: why then should he be under no duty to make it safe for passers by when he knows that the property is dangerous? The proximity is there: he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant, who in this sort of tenancy, which commonly obtains only with regard to small properties, is probably in quite humble circumstances?

In this connection it is of some assistance to refer again to *Gwinnell* v. *Eamer*. (1) It is true that this was a case of a landlord letting a house with a nuisance existing on it at the time of letting and of taking a covenant to repair. But Brett J. did suggest both in the argument and his judgment, that if the landlord knew of the defect and did nothing to cause it to be remedied, he might be liable as well as the tenant. The last case to which I desire to refer is *St. Annes Well Brewery Co.* v. *Roberts*. (2) There the premises were let to a weekly tenant and part of them, the old city wall of Exeter, fell on the plaintiffs' inn and demolished it. Here again it was sought to place on the defendants liability for letting property with an existing nuisance upon it, and the action failed as the defendants had no knowledge of the nuisance at the time of the demise. On the question I am now considering I refer particularly to the judgment of Lawrence L.J. After pointing out that as in the present case neither the landlord nor tenant was liable to repair and therefore the prima facie liability of the occupier remained, he went on to say that the case had been fought and decided upon the question whether the defendants themselves had been guilty of negligence and of failing to abate a nuisance on their property for a reasonable time after it had come or ought to have come to their knowledge. On the facts it was held that the defendants neither had nor ought to have had knowledge and were therefore guilty of no negligence, but it seems to me that the learned Lord Justice and indeed the whole Court were of opinion that had the defendants acquired that knowledge during the demise they would have been liable. While therefore that case is not a direct authority, it seems to me to give support to the view which I have formed. I think it all comes back to the words of the Lord Chief Justice in *Laugher* v. *Pointer* (1) already quoted: "it is my fault if I do not so exercise my authority as to prevent injury to another." The Silverstones had the authority; they knew, as I have found, of the necessity to exercise it; they failed to do so and are accordingly liable.

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(1) L. R. 10 C. P. 658.

(2) 44 Times L. R. 703.

One further point remains. Mr. Hallett argued that if the Silverstones were liable it followed that Marks was not. I do not think so. It is true that the cases which establish liability in the landlord do not in terms say that the tenant is also liable, but that I think is explained by the fact that in all those cases the Court was only considering the landlord's liability. But there is no reason why because the tenant has made a contract with his landlord that should alter the duty he owes to persons on the highway. Take the case I put during the argument: a landlord has agreed to do outside repairs; the tenant one day finds that guttering is defective and may fall at any moment on to the pavement; the landlord may be abroad or in a distant part of England. The tenant surely cannot escape liability merely by writing to the landlord and telling him of the defect. He must take steps to see that no injury befalls members of the public who pass his house. The law, I think, is correctly stated in Salmond on Torts (7th ed., p. 279, note (*c*)) and I hold that the tenant is

(1) 5 B. & C. 547, 576.

not exempt because the landlord is liable, but that both are liable.

The result is that judgment will be entered for the plaintiff against all the defendants for 271*l.* 14*s.* 6*d.*, with costs. As Marks has not proved a contract by the Silverstones to do the repairs, the third-party proceedings instituted by him fail and will be dismissed, but as they ought to have done the repairs, without costs.

Judgment accordingly.

Solicitor for plaintiff: *T. Magnus Wechsler.*

Solicitor for defendant Marks: *Edward Fail.*

Solicitors for defendants Silverstone: *Clifford-Turner Hopton & Lawrence.*

J. W. H.

SAMUEL *v.* ADELAIDE CLUB, LIMITED.

1934
March 19, 26.

[1934. S. No. 781.]

Gaming—Place "used" for purpose of betting with persons resorting thereto—Person "procured" by occupier of premises for betting with persons resorting thereto—Social club communicating by telephone with bookmaker's office—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1–4.

The plaintiff let premises to the defendants on condition that they should not be used for any illegal purpose. The defendants permitted a social club to occupy the premises for carrying out its objects as such. That club made an arrangement with a bookmaker to act for its members and open an account with them. Telephones were installed connecting the club premises with the bookmaker's office, and the members of the club thereby communicated their proposed bets to the bookmaker for his acceptance. The bookmaker supplied to the club premises information as to races which was published there. A commission was paid by the bookmaker to the club on all bets made with its members through him. The plaintiff brought an action against the defendants for breach of the contract of letting in permitting the premises to be used for a purpose which was illegal under the Betting Act, 1853, and claiming a declaration to that effect, an injunction, and damages:—

Held, that the defendants were permitting the premises to be "used" for the purpose of a person (the bookmaker) "procured" by the occupier (the club) betting with persons resorting thereto within the meaning of and contrary to s. 1 of the said Act, and that the plaintiff was entitled to the relief which he claimed.

Taylor v. *Monk* [1914] 2 K. B. 817; *Lennox* v. *Stoddart* [1902] 2 K. B. 21; and *Shuttleworth* v. *Leeds Greyhound Association Ld.* [1933] 1 K. B. 400 applied.

Powell v. *Kempton Park Racecourse Co.* [1899] A. C. 143, 163, 165, observations referred to.

ACTION tried by Atkinson J. without a jury.

The plaintiff, Mr. Harry Samuel, was the owner of the basement of Nos. 51 and 52 Aldersgate Street, in the City of London. In November, 1933, he let a large room in that basement to the defendants, the Adelaide Club, Ld., and it was a term or condition of the letting that the defendants would not use the premises or permit them to be used for any illegal purpose. The defendants permitted a social club known as the Adelaide Social Club to occupy the premises and there carry on their proceedings. That club existed for two purposes. One of these was a social purpose, for giving effect to which the premises were licensed, luncheons were supplied for members, and billiard and card tables were provided. The other purpose was that of providing for betting in order to attract members and to obtain revenue for the club. In order to carry out the latter purpose an arrangement was made between the social club and a firm of bookmakers, E. Percy, Ld., whose office was at No. 11 Southwark Street, in the City of London, that that firm should act as bookmakers for the members of the club, and should open credit accounts with them. The social club installed telephones and later a private telephone line connecting the club premises with the office of the bookmakers, and thereby the members of the club communicated their proposed bets either directly or through the steward or other servant of the club to the bookmakers for the acceptance of the latter. The bookmakers supplied to the steward or other servant of the club information as to races which was published by the steward or servant on a blackboard at the club premises, where there was also a tape machine by which members were informed of the results of races. With the permission of the club an agent or representative of the bookmakers attended at the club premises after every race to make and receive payment. He often stayed there throughout the racing, but he never made bets. Under a term of the arrangement the bookmakers paid a commission of 2½ per cent. to the club on every bet made with a member of the club as such. The club had been drawing an income in this way of from 5*l.* to 10*l.* a week from the bookmakers, although the flat racing season had not begun at the time when the action was heard.

On March 8, 1934, the plaintiff brought this action against the defendants. He alleged in his statement of claim (para. 3) that in breach of contract the defendants were using the demised premises or permitting them to be used by the social club for an illegal purpose in that they were allowing that club to use them as a betting house in contravention of the Betting Act, 1853, ss. 1–4 (1), whereby the plaintiff had suffered damage: the particulars under that paragraph being that the premises with the knowledge and consent of the defendants were being kept or used by the members of the club for the purpose of E. Percy, Ld., using the premises to bet with members of the club, being persons resorting to the premises, in the manner above stated; and (para. 4) that the defendants intended to continue to use or permit to be

(1) Betting Act, 1853, s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Sect. 2: "Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house within the meaning of an Act of the . . . . eighth and ninth years of her Majesty, c. 109, 'to amend the law concerning games and wagers.'"

Sects. 3 and 4 provide for the conviction and punishment of persons contravening the above provisions.

used the club premises for the said illegal purpose; and the plaintiff claimed a declaration that the defendants were using or permitting to be used the said premises as a betting house contrary to the Act of 1853, an injunction to restrain the defendants from using or permitting to be used the said premises in the said or any illegal manner, and damages.

The defendants by their defence (para. 2) denied that the social club or E. Percy, Ld., were using the premises for the alleged or any illegal purpose; (para. 3) further denied that the facts constituted a user of the premises by E. Percy, Ld., for betting with persons resorting thereto as alleged or at all; and (para. 4) alleged that the statement of claim disclosed no cause of action.

Graham Trapnell K.C. and *J. S. Hockman* for the plaintiff.

Gilbert Beyfus K.C. and *H. C. Leon* for the defendants.

[The arguments of counsel on both sides and the authorities cited appear from the judgment of the learned judge.]

March 26. ATKINSON J. read the following judgment: In this case the plaintiff, Mr. Harry Samuel, is the owner of certain premises in the basement of 51 and 52 Aldersgate Street, in the City of London. In November of last year he let the basement to the defendants, the Adelaide Club, Ld. The defendants permitted a social club known as the Adelaide Social Club to occupy this basement and there carry on a club. I have not seen the lease, but it is common ground that there is a condition in it restraining the occupiers from using the premises for any illegal purpose. In this case the plaintiff alleges that the defendants are guilty of a breach of that condition in that the premises have been used and are being used, by permission of the defendants, as a betting house contrary to ss. 1 to 4 of the Betting Act, 1853. (1) [His Lordship stated the facts substantially as above set out and continued as follows:] The question is whether there is anything illegal in the use of the club room for this organized betting with members resorting thereto, whether the room

(1) See note (1) ante, p. 71.

is being used in contravention of s. 1 of the Betting Act, 1853.(1) Sect. 3 and the later sections do not create offences: they apply as corollaries from the commission of the offences created by ss. 1 and 2.(1) The offence, whatever it is, is created by those sections. That is clear from *Powell* v. *Kempton Park Racecourse Co.* (2)

To determine whether an offence has been committed in this case it is necessary to ascertain as clearly as possible what s. 1 forbids. It does not forbid betting: it does not forbid betting in any room or place. Broadly, it forbids a place being opened, kept or used for the purpose of an occupier or other person analogous to and of the same genus as an occupier betting with persons resorting thereto. The section does not say that the place shall not be used by the forbidden persons; nor is it in terms limited to betting in the place itself. For the purpose of making sure that the object of the section shall not be easily evaded, the description of the persons for the purpose of whose betting the place must not be opened, kept or used is in wide terms. For the moment I will describe them as forbidden persons.

It is said by the plaintiff in this case that the club room, or part of it, is being opened and kept by the social club for the purpose of a firm of bookmakers, Messrs. Percy, Ld., betting with persons resorting thereto, and that the club room is in fact being used for that purpose, and that Messrs. Percy, Ld., come within the class of forbidden persons. On the other hand, the defendants contend that although there is no doubt that Messrs. Percy systematically bet with persons resorting to the club yet (1.) that the club premises are not in fact used for the purpose of that betting, and (2.) that Messrs. Percy are not within the description of forbidden persons.

I will deal first with the contention as to user, and for that purpose I assume that Messrs. Percy are forbidden persons. If the member or representative of that firm who conducts this branch of their business were present in the club room doing, face to face with the members, what is done by means

(1) See note (1) ante, p. 71.

(2) [1899] A. C. 143, 165.

of the telephone, there could be no doubt about either question. That is conceded by Mr. Beyfus, as I understand it. Under such circumstances the Courts have found no difficulty in regarding the bookmakers as occupiers or persons of that genus, and there could be no doubt about the user. It is said that the intervention of the telephone eliminates the user and takes the bookmakers out of the forbidden class. By means of the telephone the bookmakers obtain personal contact with each man who wishes to bet; the latter hears the bookmaker's voice—makes his bargain in precisely the same way as if the bookmakers were present in the room. A member of the club has but to come to the room and pick up the receiver, and at once he is in contact with the bookmaker and can arrange his bet. The bookmaker gives the steward information as to odds, desiring it to be put on a board and knowing that it will be put on a board, and that it will serve as an invitation to the members to bet: the bookmaker knows that members will see it as surely and certainly as they would hear it if he were present in person calling the odds. I dare say it is irrelevant that his servant is there in the room when and as he likes to pay and receive bets, settling up for one race while his employer is arranging bets on the next race.

Is all this a user of the premises for the purpose of betting? Mr. Beyfus contends that the club room is not being used and cannot be used for the purpose of betting unless the contract involved in a bet is actually made in the room, and that in law the contract is made where the bookmaker receives and accepts the offer—namely, in his own office. Now the section does not say that the place shall not be used by the forbidden person, but that it shall not be used for the purpose of the forbidden person betting with persons resorting thereto. Simplify the picture by supposing that the owner of a house, wishing to conduct a betting business there, did from another house precisely what Messrs. Percy do here. Could it be argued seriously that the house was not being used for the purpose of his betting just because technically each betting contract was concluded in the other house?

The evil aimed at by the section exists in precisely the same way as if he were present in person with the backers. Can the section be so easily evaded ?

In *Taylor* v. *Monk* (1) it was held that people could resort to a place without actually entering it. Betting slips were handed to a man standing outside and were passed by him to a man standing inside. Channell J., in dealing with the case, said that if the bookmaker used a landing net in which to receive the slips that would certainly constitute a user for the purpose of betting with persons resorting thereto. Suppose a bookmaker sat in a room in a building separated from the club by a passage way and the members put their slips in a landing net and handed them across the passage to a man at the window, who collected them for the bookmaker. Could it be said that the club was not being used for the purpose of the bookmaker betting with the members because technically the contract of betting was not made there ? I hold that it is not necessary, in order to constitute user, that the contract should be made in the place in question. I repeat that the statute does not say " for the purpose of making bets there with persons resorting thereto," and I do not see any reason for reading the words into the section.

I am assisted in that conclusion by two cases dealing with the proper construction of the lines following the relevant part of clause 1. The section goes on : " or for the purpose of any money being received by or on behalf of such occupier in consideration for," to put it shortly, a betting contract. In *Lennox* v. *Stoddart* (2) it was held that a place may be used for the purpose of money being received by the keeper of the place although the money is not in fact received there at all. A sporting newspaper containing a betting coupon was issued from an office ; any purchaser could cut out the coupon and send it with his stake to an address in Holland. It was held that the office from which the coupon was issued was being used for the purpose of money being received, in contravention of the section, that it was sufficient if some essential part of the operation ending in the receipt of money

(1) [1914] 2 K. B. 817.

(2) [1902] 2 K. B. 21.

took place at the office in question. If the line following the line I have to construe ought not to be read as if it contained the word "there" or the words "at such place," why should the line with which I have to deal be read as if it contained these words? The second paragraph of the judgment of Vaughan Williams L.J. in that case seems very relevant to this case. (1) In *Shuttleworth* v. *Leeds Greyhound Association, Ld.* (2) the defendants were the occupiers of a totalisator within an enclosure on their greyhound racecourse. Tickets were bought in the usual way for cash and ultimately the stakes were divided among the holders of tickets bearing the numbers of the winning dogs. It could not be contended that there was any offence under the earlier part of s. 1 in view of the decision in the case of *Attorney-General* v. *Luncheon and Sports Club, Ld.* (3), that decision being that the use of a totalisator is not with the owner of the machine but with other persons betting in the same way; but money was being received by the occupier, and the question to be determined was whether it was necessary in order to constitute an offence that the money should be received for bets with the occupier or whether it was sufficient if the bets were with other persons. There it was held that money was being received by the occupier in contravention of the section although it was received as consideration for betting promises made not by the occupier but by some other person. If a place can be used for the purpose of the receipt of money although no money comes within the place at all I cannot see why premises cannot be said to be being used for the purpose of betting although the actual bet is not made there.

Both the cases I have referred to laid it down in the clearest way that there was no justification whatever for placing any limitation on the plain words of the section or for reading into it any words which are not there. The words used are "for the purpose of a forbidden person betting with persons resorting thereto." There are no words of

(1) [1902] 2 K. B. 21, 31.
(2) [1933] 1 K. B. 400.
(3) [1929] A. C. 400.

limitation. There are no words saying the actual bet has to be made on the premises in question. Lord Russell said, in *The Queen* v. *Brown* (1): "It is the purpose which is condemned." The purpose here is plain, and the club plays an important—indeed an essential—part in the accomplishment of that purpose. I think it must always be a question of fact whether a place is being used for the purpose of forbidden betting, and in my opinion this club room is being so used. It is used for disseminating the information supplied by Messrs. Percy. The telephone is in the club room; it is used, and that part of the club at or near the telephone is used for the purpose of making every bet: that is the purpose of the telephone being there. Every offer made by a member is made from there: every acceptance is received there. Frequently counter offers must be received there and accepted from there. If a member says to Mr. Percy: "I will put 10*s*. on such a horse if you will give me 6 to 1" and Mr. Percy replies "I cannot do that but I will give you 4 to 1" and the member replies "All right, book it," it seems to me that technically the bet is made in the club itself. But be that as it may, I am satisfied that the user here comes within the plain language of the section and within the evil aimed at.

The second question is whether Messrs. Percy are within the forbidden class. That class consists primarily of an owner, occupier or keeper or any person using the "house . . . or other place" is analogous to and of the same genus as an occupier. That, of course, comes from Lord Halsbury's opinion in the case of *Powell* v. *Kempton Park Racecourse Co.* (2) Then to pursue a similar line to that followed by Lord Halsbury, the draftsman realized that there were at least three obvious methods of an occupier evading the prohibition if he stopped there. An occupier may employ another person to carry on the betting. That avenue was barred by including in the prohibition the words "or any person employed by such occupier." I think that means employed to bet in the interests of the occupier. An occupier may engage an agent to bet for and on his behalf. That avenue is barred by including the words " any person acting for or on behalf of such occupier." Or the occupier may arrange with somebody to carry on the betting not as a servant or an agent but on the terms that he, the occupier, shall benefit by the business carried on. That avenue is, in my view, barred by including the words " any person procured by the occupier." I think that means at the least procured to bet for the benefit of the occupier. With that qualification, the person procured is at least " analogous to and of the same genus " as an employee or agent. This interpretation provides a simple and reasonable scheme for the section. All the methods I have indicated of carrying on a betting business at the instance of and for the benefit of an occupier are obvious and must have been present to the mind of the draftsman. The meaning of the word " procured " has, so far as I know, not been discussed in any case, and unfortunately Lord Halsbury, in his analysis in *Powell's* case (1), omits it altogether. But some effect must be given to the words, and I do not see that any effect more restricted than that which I have suggested is possible. In this case beyond all question Messrs. Percy, Ld., were " procured " by the social club. They were procured, not with the object that benefit should accrue to the bookmakers, but that benefit should accrue to the club. But the words of the section do not stop there. As Lord Halsbury said, the person betting is to be got at whatever form he assumes. To make doubly sure of this, there are added the words in the section, " or any person having the care or management or in any manner conducting the business thereof." It is clear from Lord Halsbury's opinion that the " business " referred to is the business of betting. (2) Beyond question Messrs. Percy are conducting a betting business with the members of the club, and the club premises are so closely connected with that business that I have already decided that they are being used for the purpose of that business, and Messrs. Percy are conducting that business at the invitation of and by arrangement with the social club on terms which secure to the club a substantial revenue from it and give to

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(1) [1895] 1 Q. B. 119, 129.

(2) [1899] A. C. 143, 161.

(1) [1899] A. C. 143, 163.

(2) Ibid. 159, 163.

the club a pecuniary interest in every bet made. The system adopted here is just as much within the evil aimed at as if the betting were carried on by the club itself.

In my opinion the club room is systematically used for the purpose of persons procured by the club carrying on a betting business, betting, in the interest of and for the benefit of the club, with persons resorting thereto. If I am wrong, the social club are to be congratulated upon a most successful evasion of the plain purpose of the Betting Act. However, in my opinion they have failed so to do, and the plaintiff succeeds in the action, because it is conceded that whatever is being done is being done with the knowledge of and with the consent of the defendants. There must therefore be judgment for the plaintiff, a declaration as asked, an injunction as asked, and as only nominal damages are asked for, damages of 40*s*.

Judgment accordingly.

Solicitors for plaintiff : *Jutsum & Jones.*
Solicitors for defendants : *Rubinstein, Nash & Co.*

J. R.

BUSHELL *v.* TIMSON.

1934
Feb. 21.

Award—Execution—Seizure and Sale of Goods—Irregularity—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 52—*Workmen's Compensation Rules,* 1926, *r.* 82.

By r. 82 of the Workmen's Compensation Rules, 1926, where a party liable to pay compensation under an award is in default, the party entitled to such compensation may apply to the court for leave to issue execution against the goods of the party in default and, if no cause is shown to the contrary, the registrar may give leave for execution to issue, or, if in doubt, may refer the matter to the judge :—

Held, that compliance with the above rule is a condition precedent to execution to enforce an award, and in default of such an application a sale of goods seized in execution for the purpose of satisfying the award is void, and the purchaser has no title thereto.

The County Courts Act, 1888, s. 52, which protects officers of the court who may carry out an execution affected with irregularity, does not avail to cure non-compliance with r. 82 (above).

FURTHER CONSIDERATION of an action tried by Charles J. and a common jury at Maidstone Assizes, adjourned to London for argument.

On January 30, 1933, an award was made in an arbitration under the Workmen's Compensation Acts in favour of one Groves against the plaintiff. Upon default in payment of the sum awarded, execution of the plaintiff's goods was levied by the high bailiff at the instance of Groves. On March 13, 1933, a sale by auction of the plaintiff's goods was held for the purpose of satisfying the award, and the defendant purported to buy these goods and subsequently removed them into his possession. No application for leave to issue execution had in fact been made under r. 82 of the Workmen's Compensation Rules, 1926 (1), and the execution was carried out without an order of court. The plaintiff claimed that by reason of this irregularity the defendant had no title to the goods and that the court should make an order for delivery of the goods and damages for conversion. The defendant in his defence denied that the sale was irregular and, alternatively, disclaimed any knowledge or notice of any irregularity, alleging that he purchased the goods in the honest belief that the high bailiff had a good title thereto.

The jury answered the questions put to them in favour of the defendant. Charles J. did not enter judgment, but adjourned the case to London for legal argument.

Vernon Harington (*Montague Berryman* with him) for the

(1) The Workmen's Compensation Rules, 1926, r. 82, provides :—

"(1.) Where a party liable to pay compensation or costs under any award . . . . has made default in payment of the amount awarded . . . . the party entitled to such compensation or costs may apply to the court for leave to issue execution against the goods of the party in default.

(2.) An application for leave to issue execution shall be made on notice in writing in accordance with the County Court Rules as to interlocutory applications.

(3.) Where the application is made to the registrar he may, if no cause is shown to the contrary, and on proof of the amount in payment of which default has been made, give leave for execution to issue.

(4.) If cause is shown to the contrary, or if the registrar is in doubt as to the proper order to be made, he may refer the matter to the judge, who may make such order or give such directions as may be just."

plaintiff. The execution and sale here were irregular, and the defendant who purchased the plaintiff's goods at the auction has no title to them. Leave to issue execution was not applied for as required by the Workmen's Compensation Rules, 1926, r. 82, and the plaintiff never had an opportunity of "showing cause to the contrary." These rules deal solely with an execution under an award and the mode of enforcing it; cases as to execution under a judgment do not apply to the present case. Here the bailiff had no better title than the judgment creditor, and could confer no title on the defendant. The bailiff is in no better position than the sheriff for this purpose: *Crane & Sons* v. *Ormerod*. (1)

James Stirling for the defendant. The defendant has a good title even if the execution was irregular. The title of a bona fide purchaser is not affected by the irregularity. By the Workmen's Compensation Rules, 1926, r. 1 (*b*), those rules are to be read and construed with the County Court Rules, 1903, and subsequent rules. By the County Court Rules, 1903 to 1933, Order LIV., r. 24: "Non-compliance with any of these rules . . . . shall not render any proceedings void, unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular." The sale is not therefore avoided ipso facto, even if there was an initial irregularity. This is clear from the County Courts Act, 1888, s. 52, which provides that "no officer of any court in executing any warrant . . . . shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends." (2) In *Lyon* v. *Weldon* (3) it was held that a person who purchased goods under a distress irregularly conducted had a sufficient title to maintain trover. *Andrews* v. *Marris* (1) is distinguishable from the present case, for there statute expressly provided that application *must* be made before the clerk could issue a precept for execution.

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(1) [1903] 2 K. B. 37.

(2) By the County Courts Act, 1888, s. 52: "No officer of any court in executing any warrant of a court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damage awarded shall exceed forty shillings."

(3) (1824) 2 Bing. 334, 337.

Harington in reply. The County Courts Act, 1888, s. 52, only deals with actions brought against the high bailiff personally. It does not touch the question of the title of purchasers at a sale, consequent on an execution which is irregular. The sale was here void in its inception, and no property could pass to the purchaser. *Lyon* v. *Weldon* (2) was a case of distress for rent, and was governed by the rules of common law and not by the statutory rules which apply here.

CHARLES J. This was an action for damages for conversion, and was tried by me at Maidstone Assizes with a common jury. The plaintiff owed a certain sum under an award made under the Workmen's Compensation Acts, and when he did not pay, a warrant was issued and execution levied. The goods seized were sold by auction to satisfy the award and were bought by the defendant, as the jury in fact found. I did not enter judgment, but adjourned the case to London for argument. The plaintiff claims that the sale was void for non-compliance with the provisions of r. 82 of the Workmen's Compensation Rules, 1926. The defendant argues that although there was an irregularity the sale was not void, the irregularity being cured, so far as the defendant is concerned, when he purchased the goods in ignorance of any irregularity. The Workmen's Compensation Rules, 1926, r. 1, provides that those rules shall be read and construed with the County Court Rules, 1903, and the County Court Rules of subsequent date.

By the County Courts Act, 1888, s. 52: "No officer of any court in executing any warrant of a court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such

(1) (1841) 1 Q. B. 3.

(2) 2 Bing. 334, 337.

warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity . . . ."

It is said therefore that the officer not being a trespasser can give a valid title to the goods. There is no direct authority on the point, but cases dealing with irregular sales under judgments were cited to me as being analogous. Thus in *Lyon* v. *Weldon* (1) there was a statutory obligation by 2 W. & M., c. 5, s. 1, that the person making a distress should have the goods appraised before two sworn brokers. In that case the appraisement had not taken place, and Best C.J. said in his judgment: "If such an irregularity made the sale of the goods void, men would be afraid to purchase goods sold under a distress, and thus poor tenants would suffer more than they did from the evil which the statute was intended to remedy." In my view such cases do not affect the present case, in which the sale purported to be a sale upon execution for non-payment of an award under the Workmen's Compensation Act. Such an execution is governed by the Workmen's Compensation Rules, 1926, and r. 82 does not deal simply with the act of execution. It provides that the party entitled to compensation "may apply to the Court for leave to issue execution," that an application for such leave "shall be made on notice in writing" in accordance with the County Court Rules, and that if no cause is shown to the contrary, and on proof of the amount in payment of which default has been made, "the registrar may give leave for execution to issue." Here no application was made, no leave was given: there was no proof of amount, and no opportunity given to the defendant to show cause to the contrary. The rule further provides (para. 4) that if cause is shown to the contrary, or the registrar is in doubt, he may refer the matter to enable the party liable to file a request for arbitration proceedings. That is an elaborate statutory machinery, unlike that which applies to execution on judgments, and it is applicable only to execution on an award.

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(1) 2 Bing. 334, 337.

That distinguishes this case from those cited by Mr. Stirling. Reliance was also placed by the defendant on the County Courts Act, 1888, s. 52. [His Lordship then read the County Courts Act, 1888, s. 52, and continued:] This section protects officers of the Court who may carry out an execution affected with an irregularity, so that no officer in executing a warrant "shall be deemed a trespasser," and it is argued that this section is so wide as to cure non-compliance with r. 82 of the Workmen's Compensation Rules, 1926, which governs the execution of awards. But I do not think that is the true view. The elaborate rules dealing with execution under an award make it clear that the person upon whom execution may be levied is to be given every opportunity of avoiding that execution. Here no such opportunity was given, no application for leave to issue execution was made, and the plaintiff had no opportunity to show cause to the contrary, when the matter might have been referred to a judge. There was therefore a sale under an execution which was non-existent in law, and the sale was in its inception void. The question is not a simple one, but I am clear that the sale was void, and that there is a distinction between an execution on an award under the Workmen's Compensation Act and Rules, and an execution under a judgment, which is not hedged round with specific rules. The result is that the defendant has no title to the goods which he purported to buy at the auction sale and the property in them is in the plaintiff. There must be judgment for the plaintiff for the return of the goods or their value.

Judgment for plaintiff.

Solicitors for plaintiff: *Lewis-Barnes, Wheeler & Co.*

Solicitors for defendant: *Torr & Co., for Poncia, Swann & Carter, Ashford, Kent.*

F. P. F.

JOHN MOWLEM AND COMPANY, LIMITED *v.* LANE.

1934
March 21, 27.

London—Building—Generating station—Surveyor's fees—London Building Act, 1930 (20 *&* 21 *Geo.* 5, *c. clviii.*), *ss.* 58, 59, 89, 173, 227, *and Fifth Schedule.*

The London Building Act, 1930, s. 227, provides that where a local authority or a company has statutory powers for the supply of electricity in London, the buildings of that authority or company "used as a generating station or for works shall be deemed to be special buildings to which the general provisions of Parts V., VI., and VII. of this Act and the First and Second Schedules thereof do not apply."

A generating station having been erected by the appellants under s. 227, according to plans approved by the London County Council, the district surveyor claimed from the appellants, as the builders, the fees prescribed for a survey under Parts III. and IV. of the Fifth Schedule to the Act:—

Held, that the expression "general provisions" in s. 227 (above) refers to all the provisions in Parts V., VI., and VII. of the Act, and that, as ss. 58 and 59, under which the respondent claimed, were contained in Part VI. of the Act, he was not entitled to recover.

Case stated by a Metropolitan police magistrate.

This was a complaint preferred by the respondent, who was district surveyor for Battersea, against John Mowlem & Co., Ld., contractors (the appellants), for that they had failed to pay a fee of 476*l.* 10*s.* owing by them to him under the Fifth Schedule of the London Building Act, 1930, for a building of a cubical extent not exceeding 18,000,000 cubic feet and being the electrical power house at Battersea Power Station, Kirtling Street, Battersea.

The hearing took place at the South Western Police Court on July 12 and 19, 1933, when the magistrate allowed the complaint and made an order for the payment by the appellants of the sum claimed and costs. The appellants, being dissatisfied with the decision as being erroneous in point of law, applied to the magistrate to state a case.

At the hearing of the complaint the following facts were proved or admitted:—

(*a*) That the London Power Company is a company having statutory powers for the supply of electricity for certain purposes in London and the Battersea Power Station has been constructed and will shortly be operated as a generating station for the supply of electricity for such purposes ;

(*b*) that the appellants, John Mowlem & Co., Ld., were employed by the London Power Company to do certain building work on and about the Battersea Power Station during the construction thereof ;

(*c*) that the Battersea Power Station was erected according to plans submitted to and approved by the London County Council by virtue of s. 227 of the London Building Act, 1930 ;

(*d*) that over 700 copies of the said plans and 111 consents of the London County Council in all were from time to time furnished by the London County Council to the respondent as district surveyor for Battersea and the district surveyor surveyed the said buildings to ascertain that the same were built in accordance therewith and in performance of his duty as district surveyor ;

(*e*) that the appellants, as one of the builders, delivered to the complainant as district surveyor a notice under s. 161 of the London Building Act, 1930, of intention to erect "upon foundations already provided a steel framed building as Power House to designs already notified to the London County Council by the London Power Company, Ld.," on or about February 11, 1931. The appellants proceeded with the erection in accordance with the said notice, and the roof of the said building was covered in in or about the month of November, 1932, by the appellants ;

(*f*) that the cubical extent of the said building was 18,000,000 cubic feet ;

(*g*) that an account for 476*l.* 10*s.* was delivered by the respondent to the appellants by registered post on or about February 23, 1933 ;

(*h*) that the district surveyor did not himself approve the plans but surveyed the work and saw that it was carried out by the respective builders in accordance with the plans approved by the London County Council ;

(*i*) that the surveyor while maintaining that having regard to the nature of the building he was entitled to base his claim on Part IV. of the Fifth Schedule and charge thereunder

2½ times the amount payable under Part III. (*b*) of such Schedule (without taking into account the additional sums specified in that heading) reduced the amount to a single fee of 476*l*. 10*s*. calculated under such Part III. (*b*) because he had not himself made the necessary calculations with respect to the steel framework of the buildings since that had been done by the London County Council when approving the plans in accordance with s. 227 and not by the district surveyor under s. 58;

(*j*) that the Battersea Power Station is a building of the type described in Part IV. (*a*) of the Fifth Schedule;

(*k*) That the concrete foundations of the building were constructed by the Foundation Company, Ld., and the London Power Company, Ld., and the steelwork by Sir William Arrol & Company, Ld., and that the steel framework was clothed with brickwork and reinforced concrete by the appellants.

It was contended on behalf of the respondent that the appellants as the builders within the meaning of ss. 173 and 177 of the London Building Act were liable to pay fees in respect of the Battersea Power Station. It was further contended on behalf of the respondent that this was a special building to which s. 89 applied and that nothing in s. 227 of the Act exempted the appellants from liability to give notices under s. 161 or to pay fees under s. 173 and the Fifth Schedule; that on the true construction of s. 227 the appellants were not exempted from the provisions of Parts V., VI., and VII. of the said Act nor released from the liability to pay such fees unless expressly exempted by the Council from such liability; and the Council had not so expressly exempted the appellants.

It was contended on behalf of the appellants that by virtue of s. 227 the Battersea Power Station was exempt from the provisions of Parts V., VI., and VIII. of the Act; that in consequence of such exemption Part III. of the Fifth Schedule did not apply to the said station having regard to the exception stated in the said Part III. (*b*)—namely, "except buildings exempt from the provisions of Parts VI. and VII. of this Act," that, alternatively Part III. of the Schedule did not apply to the said station having regard to the further exception stated in the said Part III. (*b*)—namely, "Buildings referred to in heading (*a*) of Part IV. of this Schedule"; that therefore if fees were to be claimed at all under the said Act such fees must be claimed under Part IV. It was further argued that even if it could not be said that by virtue of s. 227 this building was exempt from the general provisions of Parts V., VI., and VII. of the Act, nevertheless the respondent could only claim fees under Part IV. of the Fifth Schedule if he also brought himself within s. 173, sub-s. 2, and that in the circumstances it could not be said that the building in question was erected under sections 58 and 59, but under s. 227 and further that by s. 58, sub-s. 7, and s. 59, sub-s. 12, those sections respectively could not apply and therefore there was no provision in the Act entitling the respondent to recover fees in the circumstances of this case. It was further argued that even if fees were recoverable the appellants were not liable, as they were not "the builder" employed on the work but only one of three builders, and that in the circumstances fees, if recoverable at all, must be recovered from the owner. [This contention was abandoned in the argument upon the case stated.]

The following sections of the London Building Act, 1930, were referred to: ss. 5, 58, 59, 81, 89, 165, 173, 177, 212, 223, 224, 225, 226, 227, 228, 236, sub-ss. 1 and 2, Third Schedule, Fifth Schedule (Parts III. and IV.), Sixth Schedule; and the following authority: *London County Council* v. *District Surveyors' Association and Willis.* (1) [Sects. 58, 59, 173 and 227 are summarized or set out below. (2)]

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(1) [1909] 2 K. B. 138.

(2) The London Building Act, 1930 (20 & 21 Geo. 5, c. clviii.). Sects. 58 and 59 make provisions as to buildings of metal skeleton construction and reinforced concrete.

Sect. 173 provides that the following rates shall have effect with respect to fees payable by builders or by owners or occupiers to district surveyors:—

Sub-s. 1: "The builder or in his default the owner or occupier as the case may be of a building structure or work mentioned in Part III. of the Fifth Schedule to this Act shall pay to the district surveyor in respect of such building structure or work fees in accordance with the said Part III. or such other fees not exceeding the amount specified in the said Part III. as may from time to time be directed by the Council."

Sub-s. 2: "Where under the pro-

The magistrate was of opinion that on a true construction of s. 227 of the said Act the phrase " shall be deemed to be a special building to which the general provisions of Parts V., VI., and VII., and the First and Second Schedules do not apply " did not mean that the said buildings were exempt from the general provisions of Parts V., VI., and VII. and the First and Second Schedules, unless so exempted by the Council, and that when these parts or any of them were inapplicable or inappropriate other parts of the Act would be applied, e.g., s. 89. He accordingly adjudged that the respondent was entitled to recover from the appellants the sum of 476*l.* 10*s.* with costs, but stated this case for the opinion of this Court.

The question on which the opinion of the Court was desired was whether, upon the above statement of facts, the magistrate came to a correct decision and determination in point of law.

J. E. Singleton K.C. and *Wynn Werninck* for the appellants. This generating station was erected under the London Building Act, 1930, s. 227, and the district surveyor is only entitled to such fees as are prescribed by that Act. The fees are set out in the Fifth Schedule. A claim under Part IV. of that Schedule would only be maintainable if the building were erected under ss. 58 and 59, which deal with the erection of buildings of metal skeleton construction and reinforced concrete. But these sections have no application here, being contained in Part VI. of the Act, the provisions of which are expressly excluded by s. 227 in the case of a generating station. For the same reason s. 173, sub-s. 2, does not apply : nor is s. 173, sub-s. 1, in point,

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visions of s. 58 or s. 59 of this Act . . . . any building is erected . . . . the builder or in his default the owner or occupier as the case may be of the building shall pay to the district surveyor fees in accordance with Part IV. of the Fifth Schedule to this Act."

Sect. 227 : "Where a local authority or a company has statutory powers for the supply of electricity in any district in London the buildings of that local authority or company used as a generating station or for works shall be deemed to be special buildings to which the general provisions of Parts V., VI., and VII. of this Act and the First and Second Schedules thereof do not apply and plans thereof shall be submitted to the Council for their approval."

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John Mowlem & Co. v. Lane.

as this is not a building mentioned in the Fifth Schedule, Part III. The scale of fees under the Act of 1894 is no longer in force, the statutes of 1894 and 1930 being quite distinct. There is thus no provision in the Act which entitles the respondent to recover.

R. M. Montgomery K.C. and *W. H. Duckworth* for the respondent. We concede that these fees are only recoverable if they are brought under the Fifth Schedule, Part IV. Sects. 58 and 59 are not general, but special provisions, which relate to a particular kind of building to which a generating station may or may not belong. "General" buildings are buildings of whatsoever material they may be constructed, whereas special buildings are those of the particular type referred to in ss. 58 and 59. If these sections are not applicable, then we rely on s. 89 of the Act, which governs other cases. The operation of ss. 58 and 59 is not confined to generating stations, although they are a type of building to which those sections apply. The statute cannot have intended that the surveyor should not be paid for difficult work of this kind. We submit that s. 227 does not exclude the operation of ss. 58 and 59 and the appropriate Schedule in the present case.

Singleton K.C. in reply. Sect. 58, sub-s. 7, specifically states that nothing in this section or in the Third Schedule shall apply in the case of the erection of any building in accordance with the Act "other than this section and the said schedule."

The Court (Lord Hewart C.J., Avory and Talbot JJ.) allowed the appeal, but decided to deliver a considered judgment at a later date.

March 27. Avory J. read the judgment of the Court, which was as follows:—

The claim of the district surveyor in this case can only be maintained if it can be brought within the provisions of s. 173, sub-ss. 1 or 2, of the London Building Act, 1930. The building in question, the Battersea Power Station, is found in the special case to be a building of the type described in Part IV. (*a*) of the Fifth Schedule, but the respondent does not claim under that head, but under Part III. (*b*) of the Fifth Schedule, and a claim for fees under Part IV. of the Fifth Schedule can only be maintained if the building is erected under ss. 58 or 59 of the Act (see s. 173, sub-s. 2).

The building in question in this case is a building of a local authority used as a generating station within the meaning of s. 227 of the Act and therefore is a special building to which the general provisions of Parts V., VI., and VII. of the Act do not apply. In our opinion the expression "General Provisions" in this section must be construed to mean all the provisions of those Parts of the Act, and it is not possible to say, as suggested in argument for the respondent, that there are *special* provisions in those Parts of the Act which do apply to such a building, nor to say which are the special provisions that do apply. It is to be noticed that Part VII. appears to contain no provisions which are "general" according to the meaning suggested in the argument for the respondent. Compare the heading or title of Part VII., which has statutory authority (s. 2).

In the circumstances, the question to be determined is, whether the building, that is the generating station, can be brought within the provisions of s. 173, sub-s. 2, of the Act. It cannot be brought within the provisions of s. 173, sub-s. 1, because it is not a building mentioned in Part III. of the Fifth Schedule, being specifically exempted from Parts VI. and VII. of the Act by s. 227, and being also probably a building referred to in heading (*a*) of Part IV. of this Schedule.

The result is, as Mr. Montgomery for the respondent frankly admitted, that unless it can be shown that the building was erected under the provisions of s. 58 or s. 59 of the Act, the contention of the respondent fails; but these sections are in Part VI. of the Act, which by s. 227 is not to apply to the building in question, and it therefore cannot be said to have been erected under those provisions. Indeed it is clear from paragraph (*c*) of the facts in the special case that it was erected under s. 227.

The remaining question is whether the decision of the learned magistrate can be supported for the reasons given by him in his opinion. We cannot follow his view that the building is not exempt from the general provisions of Parts V., VI., and VII. of the Act unless so exempted by the Council. Sect. 89 of the Act to which he refers is in Part VII. of the Act and therefore specifically excluded. The contention that the appellants were not the builders was abandoned in the argument. In our opinion, the decision of the magistrate cannot be supported and the appeal should be allowed.

Appeal allowed.

Solicitor for the appellants : *A. C. Giles.*
Solicitors for the respondent : *C. V. Young & Cowper.*

F. P. F.

1934
Feb. 26.

DUKE OF ATHOLL *v.* READ.

Justices—Case stated—Notice of Appeal to respondent—Non-service before transmission of case stated to High Court—Matter going to jurisdiction and not discretion—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2.

Sect. 2 of the Summary Jurisdiction Act, 1857, provides that an appellant by case stated, after receiving the case signed by the justice or justices, "shall, within three days after receiving such case, transmit the same to the court . . . . first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given . . . . ":—

Held, that the giving of the notice of the appeal, with a copy of the case stated, to the respondent, before the case is transmitted to the High Court, is a condition precedent to the jurisdiction of the Court to entertain the appeal and cannot be waived.

Ashdown v. *Curtis* (1862) 31 L. J. (M. C.) 216 followed.
Simmonds v. *Elliott* [1917] 2 K. B. 894 not followed.
Wills & Sons v. *McSherry* [1913] 1 K. B. 20 distinguished.

MOTION.

An information was preferred by the respondent, Chief Inspector Read, of the Metropolitan Police, against the appellant, the Duke of Atholl, alleging that, on September 26, 1933, he had sold to Arthur James Chappell a ticket in a lottery called "the Duke of Atholl's Fund," not authorized by Act of Parliament to be sold, contrary to s. 41 of the Lotteries Act, 1823. The information came on before the Chief Metropolitan Magistrate at Bow Street Police Court on November 14, 1933. At the close of the hearing on that day the Magistrate reserved his decision. On November 24, 1933, the Magistrate delivered his considered judgment, in which he convicted the appellant of the offence of selling a ticket in a lottery, fined him 25*l.* and ordered him to pay a sum for costs.

Within three days of the date of that decision the appellant asked the magistrate to state a case for the opinion of the High Court. On February 6, 1934, the magistrate approved and signed a case which had been settled by counsel. On February 15, 1934, the appellant entered into recognizances to prosecute his appeal, and the signed case was handed to his solicitor. On February 16 the appellant's solicitor filed the case stated in the High Court and at the same time notified the solicitor for the prosecution that he had done so, and forwarded to him a copy of the case stated and of the notice of appeal. Objection was taken on behalf of the prosecution that by reason of non-compliance with s. 2 of the Summary Jurisdiction Act, 1857 (1), the Court had no jurisdiction to hear the appeal.

The appellant moved the Court for leave to proceed with his appeal by way of case stated and signed by the Chief Magistrate of the Metropolis, notwithstanding the fact that the case was transmitted to the High Court before notice in writing

(1) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2: "After the hearing and determination by a justice or justices of the peace of any information or complaint . . . . either party to the proceeding . . . . may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case . . . . for the opinion thereon of one of the Superior Courts of Law to be named by the party applying; and such party, hereinafter called 'the appellant,' shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given hereinafter called the respondent."

of the appeal and a copy of the case stated had been given to the respondent as required by s. 2 of the Summary Jurisdiction Act, 1857, or alternatively, for an order that the appellant may be permitted to withdraw the case from the Central Office, and forthwith to refile the same, so as to cause the service of such notice of appeal and copy of the case to precede the filing of the case, and that such further and other consequential directions may be given as will enable the appellant to comply with the requirements of the section.

Norman Birkett K.C. and *G. O. Slade* for the appellant. By a slip, the case stated was transmitted to the High Court without first giving notice in writing of the appeal with a copy of the case stated to the " other party to the proceeding," i.e., the prosecution, as required by s. 2 of the Summary Jurisdiction Act, 1857. The point is technical. No one has been prejudiced by the omission. The prosecution are in no way prejudiced by what has happened, because the case stated has been in their hands for a considerable time. The appellant ought not to be debarred from obtaining the opinion of the High Court by reason of a slip which was outside his personal control. The point does not go to jurisdiction and the Court has a discretion in the matter: see *Wills & Sons* v. *McSherry* (1); *Simmonds* v. *Elliott.* (2) In the alternative, it is asked that the appellant be permitted to withdraw the case stated from the file, and, after giving notice of the appeal to the prosecution, with a copy of the case, in accordance with s. 2 of the Act of 1857, replace it on the file.

Sir Donald Somervell S.-G. and *Eustace Fulton* for the respondent. The question raised here is not one of discretion, but is one that goes to jurisdiction. Where notice of the appeal has not been given to the prosecution by the appellant in accordance with s. 2 of the Summary Jurisdiction Act, 1857, the Court has no jurisdiction to hear the appeal and consent by the prosecution will not give the Court jurisdiction to entertain the application. The case of *Wills & Sons* v. *McSherry* (1) is not in point, because the Court decided it

(1) [1913] 1 K. B. 20.

(2) [1917] 2 K. B. 894.

on the principle of not insisting on what was impossible. This case has nothing to do with impossibility.

[*Morgan* v. *Edwards* (1); *Woodhouse* v. *Woods* (2); *Ashdown* v. *Curtis* (3); and *Rust* v. *St. Botolph's Churchwardens* (4) were also referred to.]

The alternative application made on behalf of the appellant cannot be entertained because, by s. 2 of the Summary Jurisdiction Act, 1857, either party to the proceeding may, if dissatisfied with the determination of the justice or justices as being erroneous in point of law, apply in writing within three days after the same to the justice or justices to state and sign a case for the opinion of the High Court, and the section requires the party applying for the case to be stated, i.e., the appellant, to transmit the case to the Court within three days of receiving it. If the case is taken off the file, these requirements of s. 2 cannot be complied with.

Birkett K.C. replied.

AVORY J. The application which is made to the Court in this case is that the appellant, the Duke of Atholl, may be given leave to proceed with his appeal by way of case stated and signed by the Chief Magistrate of the Metropolis, notwithstanding the fact that the case was transmitted to this Court before notice in writing of such appeal and a copy of the case so stated and signed had been given to the respondent as required by s. 2 of the Summary Jurisdiction Act, 1857; or, alternatively, for an order that the appellant may be permitted to withdraw the said case from the Central Office, and forthwith to refile the same, so as to cause the service of such notice of appeal and copy of the case as aforesaid to precede the filing of the said case, and that such further and other consequential directions may be given as will enable the appellant to comply with the requirements of the said section.

I regret to have to come to the conclusion that we cannot give effect to either of these applications. With regard to

(1) (1860) 29 L. J. (M. C.) 108.
(2) (1859) 29 L. J. (M. C.) 149.
(3) (1862) 31 L. J. (M. C.) 216.
(4) (1906) 94 L. T. 575.

the first, that the appellant may be given leave to proceed with his appeal notwithstanding the fact that the case was transmitted to the Court before notice in writing and a copy of the case had been given to the respondent, I have come to the conclusion that it is impossible to give effect to that application consistently with the decided cases, which have held that the giving of the notice of appeal with a copy of the case stated to the respondent before the case is transmitted to this Court, is a condition precedent which cannot be waived, and without compliance with which this Court has no jurisdiction to entertain the case stated.

The only decision which is in conflict with the many previous decisions on this point is the one latest reported, *Simmonds* v. *Elliott.* (1) In that case Mr. Branson, who appeared for the appellant, called the attention of the Court to the fact that the notice of appeal and copy of the case were not served on the respondent until half an hour after the case had been lodged at the Central Office. He called attention to the words of s. 2 of the Summary Jurisdiction Act, 1857. The respondent did not appear in that case, and there was no argument on the point. Darling J. said (2) : "There is nothing to prevent the Court hearing the appeal. The respondent was in no way prejudiced, and he does not appear and take the point." It appears to me impossible to adopt the decision in that case without overruling in effect all the previous decisions which have held that the Court has no jurisdiction under such circumstances as were disclosed in that case, and I doubt whether the Court in that case would have come to the conclusion that they did, in allowing the case to be heard and determined, if there had been any appearance of the respondent, and the point had been fully argued. In fact, I think, the true view of the case is that because the point was not taken by the respondent the Court there thought that they were not bound to give effect to the objection. I am not saying that that was a good reason, because in my view, in whatever way a point going to the jurisdiction of the Court is brought to the notice of the Court, the Court is bound to give effect to it.

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(1) [1917] 2 K. B. 894.

(2) Ibid. 894, 897.

Probably the strongest case against the application is *Ashdown* v. *Curtis* (1), where it was held that "If notice of Appeal under the statute 20 & 21 Vict. c. 43, s. 2, be not given to the respondent before the case is lodged in Court, the case will be struck out. It is not sufficient to post the notice of appeal to the respondent within three days allowed for lodging the case, if it does not reach the respondent until the day after the case is transmitted to the office." The facts in that case appear to be identical with the facts in the present case, and the decision has never been criticized or overruled. Mr. Birkett has invited us to apply the decision in *Wills & Sons* v. *McSherry* (2), but I am clearly of the opinion that that decision has no application to the present case, because the sole ground of that decision was that there it was physically impossible for the appellant to comply with the provisions of the statute. There is no suggestion in this case that there was any physical impossibility to comply with the statute.

It becomes necessary, therefore, to consider the alternative application: "That the appellant may be permitted to withdraw the case, and forthwith to re-file the same, so as to cause the service of such notice of appeal and copy of the case to precede the filing." At one time I thought it was possible the Court might give effect to that application by a rule in the nature of a mandamus to the Magistrate to re-state and re-sign the case so that the provisions of the statute might be complied with, but I have come to the conclusion that it is not possible to give effect to this alternative application, seeing that the statute requires that "either party . . . . may, if dissatisfied with the said determination . . . . apply in writing within three days after the same to the said justice or justices, to state and sign a case . . . ." and that it is impossible in the circumstances for the appellant to comply with the statute by making any application within three days after the determination of the case. In fact, the only way in which effect could be given to this alternative application would be, if it were possible, to commence the proceedings entirely de novo, which would mean the issue of a fresh summons, and that is impossible because of the six months' limitation of time. So I have reluctantly come to the conclusion that we cannot give effect to the alternative application, and the result, much as it is to be regretted, is that, this objection having been taken and brought to the notice of the Court, we have no jurisdiction to entertain this appeal, and the only order we can make is that it shall be struck out.

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(1) 31 L. J. (M. C.) 216.

(2) [1913] 1 K. B. 20.

ACTON J. I am of the same opinion. At a very early stage of the argument in this case I was of the opinion that *Wills & Sons* v. *McSherry* (1) upon which Mr. Birkett relied was not in point, because that case was concerned with impossibility, and this case has nothing whatever to do with impossibility. In the course of the argument it indeed appeared to me that that case, instead of being an authority in Mr. Birkett's favour, is an authority against him, and I say so by reason of the following sentences from the judgment of Channell J. (2) He says: "The law applicable to the point"—that is, the point of impossibility—"is clearly stated in Maxwell on the Interpretation of Statutes (5th Edition) at page 621: 'Enactments which impose duties on conditions are, when there are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that lex non cogit ad impossibilia aut inutilia. They are understood as dispensing with the performance of what is prescribed, when performance is idle or impossible. . . . In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown.'" For the purpose of the present decision, the words to be emphasized or italicized are "without any default on the part of the person on whom the duty was thrown." Here of course

(1) [1913] 1 K. B. 20.

(2) Ibid. 25.

the question is one of default and nothing else, and no question of impossibility or impracticability is suggested. Channell J. then goes on: "The author then refers to *Morgan* v. *Edwards* (1), *Woodhouse* v. *Woods* (2), and *Syred* v. *Carruthers* (3), and says: 'If the respondent in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in searching for him, the service required by the statute would probably be dispensed with. . . . . Where, however, the act or thing required by the statute is a condition precedent *to the jurisdiction* of the tribunal, compliance cannot be dispensed with; and if it be impossible, the jurisdiction fails.' That last passage shews that there is a difficulty in holding that the Court has power to dispense with the performance of the conditions precedent laid down in this statute. If the point is put in that way I think the Court clearly cannot do so." That is the point which is raised, as I understand it, by the Solicitor-General, that non-compliance with the condition precedent to the jurisdiction prescribed by the statute is fatal. That is a proposition on which the Solicitor-General relies, and that proposition seems to me to be quite clearly enunciated in the very authority on which Mr. Birkett relies.

I agree with the judgment delivered by my Lord, and for the reasons stated by him.

CHARLES J. With the same reluctance that was expressed by my Lord, I agree that this application to us fails. Indeed, were we to come to any other conclusion it would be contrary to every decision since 1859. This matter has been considered again and again whether or no the words which I am about to read are conditions precedent to the hearing of the appeal: "The Appellant shall, within three days after receiving such Case, transmit the same to the Court named in his application, first giving notice in writing of such appeal" and so forth and so on. In 1859, in *Woodhouse* v. *Woods* (4) Blackburn J. said: "The Court has no jurisdiction to hear the appeal, except by this act of parliament; and the second section gives that jurisdiction, and uses the words 'first giving notice,' etc. If the legislature intended to say that the giving such notice should be a condition precedent to our hearing the appeal, I see no other words which could have been used. The legislature must be considered to have made it a condition precedent." That decision was approved in the case which my Lord has referred to, of *Ashdown* v. *Curtis*. (1) In 1906 the matter was again considered in *Rust* v. *The Churchwardens of St. Botolph, Bishopsgate*. Lord Alverstone C.J. said (2), sharing the feelings of Lord Russell of Killowen C.J. expressed in the case of *Hill* v. *Wright and Wilson* (3), that he gave effect to this preliminary objection with reluctance. Then he goes on: "But I consider the practice is too rootedly fixed to enable us to overrule it. It is a statutory condition." We have been asked to say that we have jurisdiction to consider this matter, because of *Wills & Sons* v. *McSherry* (4). For myself I cannot see that that case has any application. This is a case of inadvertence, and that was a case of impossibility. Where it is shown to the satisfaction of a Court that impossibility exists then compliance with the statute may be assumed, but where there is no such impossibility and it is mere inadvertence, the Court has no power at all to give itself a jurisdiction which the statute does not itself give. We are asked to say that the case of *Simmonds* v. *Elliott* (5) should enable us to accept jurisdiction in this case. There it is perfectly true that it was not a matter of impossibility, but only of difficulty. But in that case the respondent did not appear and take the point; the matter was never argued, and Darling J. said: "There is nothing to prevent the Court hearing the appeal." I cannot help thinking that if the matter had been argued a different conclusion would have been arrived at, and I say so the more because I observe that Darling J. was a party to the judgment in *Rust* v. *The Churchwardens of St. Botolph* (6), to which I have already

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(1) 29 L. J. (M. C.) 108.

(2) 29 L. J. (M. C.) 149.

(3) (1858) E. B. & E. 469.

(4) 29 L. J. (M. C.) 149, 150.

(1) 31 L. J. (M. C.) 216.
(2) 94 L. T. 575, 576.
(3) (1896) 60 J. P. 312.
(4) [1913] 1 K. B. 20.
(5) [1917] 2 K. B. 894, 897.
(6) 94 L. T. 575.

referred. If those matters had been brought to the notice of the Court, the result probably would have been that the long line of cases, to some of which I have referred, would have been followed, and it would have been held that the Court had no jurisdiction to consider the application. Certain alternatives have been proposed which would get over the difficulty in which the applicant finds himself here involved. I think it unnecessary myself to refer to those suggested methods whereby the condition precedent which has not been fulfilled might yet be so brought into shape that a condition precedent ultimately would be fulfilled.

I agree with what my Lord has said on this point, and I do not desire to add anything further on the proposed method of curing that which is in my judgment an incurable defect.

Appeal dismissed.

Solicitors for the appellant: *Walter Crimp & Co.*
Solicitor for the respondent: *The Treasury Solicitor.*

T. W. M.

d. WILLIAMS
F CORPN.
] 1 K. B. 514

LIDDLE v. YORKSHIRE (NORTH RIDING) COUNTY COUNCIL.

C. A.
1934
April 10, 11, 12, 23.

[1933. L. 315.]

Negligence—Nuisance—Road repair—Heap of soil at edge of road—Allurement—Infant trespasser.

In the course of carrying out a road improvement in their district the defendant council's workmen had to excavate a large quantity of soil which, till it could be cleared away, was placed on the new verge of the road against a new retaining wall which the council had built. This heap of soil formed a slope giving easy access to the top of the wall. There was evidence that the children of the neighbourhood played about the works, but were always warned off when workmen were there. On a Saturday afternoon, after the workmen had left, two boys were sitting on the new wall, and seeing them there the plaintiff, a boy of seven years of age, who also had been previously warned off, climbed up the heap and sat on the wall between the other two, and in trying to show them how bees flew he waved his arms and, losing his balance, fell backwards and sustained injuries in respect of which he sued the defendant council:—

Held, that in climbing up the heap of soil and in sitting on the wall the plaintiff was a trespasser to whom the defendants owed no duty, not having constructed or placed the heap where it was with a view of causing him an injury, or, indeed, in contemplation of him at all.

Held, further, that the temporary heap of soil placed as it was on undedicated land did not constitute a nuisance.

Per SCRUTTON L.J. To make a landowner liable for injury to children on his land, it must be proved that he expressly or impliedly invited them on to his land, and either did an act which caused damage with knowledge that it might injure them, or knowingly permitted the existence on his land of a hidden danger or trap. An invitation may be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, the landowner is not liable. The decision in *Cooke* v. *Midland Great Western Railway of Ireland* [1909] A. C. 229, must be treated as dealing with a child who was impliedly licensed to use the turntable which for a child constituted a trap.

Decision of Swift J. reversed.

APPEAL from a decision of Swift J. in an action tried at Leeds with a special jury.

The plaintiff, an infant, suing by his father as next friend, claimed damages from the defendant council in respect of injuries sustained by him on September 24, 1932, in falling from a wall.

The facts, which are fully stated in the judgments, were shortly as follows:—

In September, 1932, the defendant council, as the highway authority, were engaged in a road improvement covering about half a mile. Where the accident giving rise to the action occurred, the improvement consisted in making a sharp turn an easier one by erecting on the outside edge of the corner a new retaining wall four feet six inches high, with a castellated top. The process of excavation and construction dislodged a quantity of unwanted soil which during the week before the accident was stacked on the new verge against the new wall and came nearly to the top of the stone course of the wall below the castellation. It was being removed, but on the Saturday afternoon, September 24, 1932, there was enough at the place of the accident to make a slope extending on the verge to six or seven feet from the wall, thus giving

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easy access to the top of the wall. The road work was not completed at the time of the accident. There was evidence that the children of the neighbourhood used to play about the works when there was no one there, but they were always warned off when workmen were there. On the day in question, after the workmen had left, two boys were sitting on the new wall, having apparently reached it by climbing up the heap. Each of these boys admitted having been told not to play there, " because they would tumble over." Those boys were joined by the infant plaintiff, a boy of seven years of age who also had been " warned off the job " by one of the workmen ; he climbed up the heap and sat on the wall between them ; he then began to talk to them " about the bees and showed the boys how the bees were flying about, waving his arms," when he fell backwards and sustained the injuries complained of.

At the trial certain questions were left to the jury which, with their answers, were as follows : " Were the defendants negligent in leaving the heap of soil next to the wall ? " (A.) " Yes." " Were the acts of the defendants an invitation or an allurement to the infant plaintiff to go upon the wall ? " (A.) " Yes." " Was the heap of soil so placed against the wall in the nature of a trap to the infant plaintiff ? " (A.) " Yes." " Did the heap of soil and the wall in the circumstances constitute a thing dangerous in itself if meddled with ? " (A.) " Yes." " Did the negligence of the defendants cause the infant plaintiff's injuries ? " (A.) " Yes." " Was the infant plaintiff lawfully using the highway ? " (A.) " Yes." " Was the heap of soil so placed against the wall a nuisance on the highway ? " (A.) " Yes." " Was such nuisance the cause of the infant plaintiff's injuries ? " (A.) " Yes." " Damages ? " (A.) 1500*l.*, for which judgment was entered for the plaintiff.

The defendants appealed.

Singleton K.C., *Morley K.C.* and *D. H. Robson* for the appellants. First, the plaintiff was a trespasser to whom therefore the appellants owed no duty save that of not setting a trap for him. In Salmond on Torts (7th ed.), p. 233, the law is correctly stated thus: "Even he who has a right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose. The chief application of this rule is the abuse of a right of way, public or private; but presumably the same principle applies to all rights of entry. A public highway is a piece of land vested either in some local authority or in the adjoining landowners, and subject to a public right of way. Any person, therefore, who uses a highway for any purpose other than that of passage (including the subordinate purposes reasonably and ordinarily incident to passage . . . .) becomes thereby a trespasser." What the respondent did in climbing up the heap of soil and sitting on the wall was certainly not a purpose "reasonably and ordinarily incident to passage." It is only where there is a concealed danger, such as were the poisonous shrubs in *Glasgow Corporation* v. *Taylor* (1), or something in the nature of an allurement such as the turntable was held to be in *Cooke* v. *Midland Great Western Railway of Ireland* (2), that the owner of land can be held liable for injuries sustained by a person coming on to his land. There is no duty to give warning or protection against dangers which are themselves obvious: per Lord Shaw in *Glasgow Corporation* v. *Taylor*. (3) In *Donovan* v. *Union Cartage Co.* (4) an unhorsed van belonging to the defendants was left by them, unattended, in a public street, outside their premises. A child playing with other children climbed on to the van, fell and was injured. The Divisional Court held that there was no inherent danger in a sound, stationary, and immobile vehicle left unattended in the street, and further, that even if the car could be said to be an obstruction to the use of the highway, there was no relation of cause and effect between it and the occurrence of the accident. In principle there is no distinction between the van in that case and the wall in this. Acton J. there summarized the decisions on this point and we adopt his reading of them. Moreover, in this case the respondent had been warned not to go on to the heap of the soil, and as despite that warning he climbed upon it he did so at his own risk : *Hardy* v. *Central London Ry. Co.* (1) ; *Addie* (*Robert*) *& Sons* (*Collieries*) v. *Dumbreck.* (2)

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(1) [1922] 1 A. C. 44.
(2) [1909] A. C. 229.
(3) [1922] 1 A. C. 60, 61.
(4) [1933] 2 K. B. 71.

[GREER L.J. The later case of *Excelsior Wire Rope Co.* v. *Callan* (3) seems difficult to reconcile with *Addie's* case. (2)]

In *Excelsior Wire Rope Co.* v. *Callan* (3) Lord Dunedin said that the action of the company's servants in setting in motion the machinery which caused the injuries complained of " was so reckless as to amount to malicious acting," just as was the act of the man in *Mourton* v. *Poulter* (4) in felling the tree without warning the children standing round.

[*Lynch* v. *Nurdin* (5) ; *Thomson* v. *Lanarkshire and Dumbartonshire Ry. Co.* (6) ; and *Barker* v. *Herbert* (7) were also cited.]

Willoughby Jardine K.C. and *H. Brian Taylor* for the respondent. A highway authority must conduct its repair operations with reasonable care so as not to be a danger to those frequenting the highway.

[SCRUTTON L.J. Does a person use the highway who goes off it ?]

The public have the right to the whole width of the road and not merely the via trita : *Turner* v. *Ringwood Highway Board.* (8) The jury found that the respondent was not a trespasser, and so he must be taken to have the right of general use of the highway : see per A. L. Smith L.J. in *Hickman* v. *Maisey.* (9) The heap of soil was an allurement and took the respondent into a position of danger in which he suffered injury. It is said that he had been warned not to go on to the heap, but the warnings, if any in fact were given, were of too sketchy a nature to be effective. The respondent was a licensee and not a trespasser, and the decision in *Excelsior Wire Rope Co.* v. *Callan* (3) is a direct authority for imposing liability on the appellants for leaving

(1) [1920] 3 K. B. 459.
(2) [1929] A. C. 358.
(3) [1930] A. C. 404.
(4) [1930] 2 K. B. 183.
(5) (1841) 1 Q. B. 29.
(6) (1897) 24 R. 1025.
(7) [1911] 2 K. B. 633.
(8) (1870) L. R. 9 Eq. 418.
(9) [1900] 1 Q. B. 752, 755.

the soil where it was, knowing that children were in the habit of climbing on it: see also per Hamilton L.J. in *Latham* v. *Johnson & Nephew, Ld.* (1), where he said that "a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook* (2); *Lynch* v. *Nurdin* (3)) that injury would not have occurred." *Donovan* v. *Union Cartage Co.* (4) is not binding upon this Court; moreover, it is submitted that it was wrongly decided.

Further, there was evidence to justify the jury's finding that the heap of soil left where it was constituted a nuisance. In *Harrold* v. *Watney* (5) Vaughan Williams L.J. said this (6) "When asking one's self if the nuisance was the cause of the accident one gets a test in this way: Ought what the child did to have been present to the mind of the person who created the nuisance as a probable result of his act?" To that question the answer in this case must be that it ought to have been present to the mind of the appellants' servants that children would climb up on the heap with the probable consequence of sustaining injury.

Singleton K.C. replied.

Cur. adv. vult.

April 23. The following judgments were read:

SCRUTTON L.J. A boy just seven years of age brings, by his father as next friend, an action against the road authority for the North Riding of Yorkshire. His complaint is that while sitting on a wall the authority had built to bound and hold up a road they were in course of widening, he tumbled over backwards down a steep place and injured his head. His pleaded cause of action is that the authority negligently placed against the wall in the course of their operations a heap of the excavated soil without guarding the plaintiff from the danger of going on the heap to sit on the wall, or, in the alternative, created a nuisance in the highway by placing the heap against the wall and thereby caused the plaintiff to tumble off the wall.

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(1) [1913] 1 K. B. 398, 413.

(2) (1828) 4 Bing. 628.

(3) 1 Q. B. 29.

(4) [1933] 2 K. B. 71.

(5) [1898] 2 Q. B. 320.

(6) Ibid. 325.

After a summing up, the sufficiency of which is attacked, a special jury of the Riding answered every question they were asked in favour of the boy. At the end of the evidence, the judge was asked and refused to enter judgment for the defendants.

The defendants now appeal, primarily on the ground that on the evidence there was no cause of action against them; secondarily on the grounds of insufficient direction.

It is important in the first place to get the facts clear. The road authority at the time of the accident, Saturday afternoon, September 24, were engaged in a road improvement covering about half a mile of road. Where the accident happened, the improvement consisted in making a sharp turn a much easier one—"a very dangerous corner made very efficient, an excellent job." That is the statement of one of the plaintiff's witnesses. This was done by removing an old wall and the field beyond it so as to make a rounder corner, and erecting a retaining wall on the outside edge of the corner. On the site of the old wall and the portion of the field up to the new wall, there was made a concrete widening of the old road, bounded by a grass verge between the road and the new wall. That new wall was four feet six inches high, with a castellated top. The process of excavation and construction produced a quantity of unwanted soil. This, during the week before the accident, was stacked on the new verge against the new wall and came, on the evidence for the plaintiff, nearly to the top of the stone course below the castellation. It was being removed by lorry, but on the Saturday afternoon there was enough at the place of the accident to make a slope extending on the verge to six or seven feet from the wall, and thus giving an easy access to the top of the wall. The road work was not completed at the time of the accident. The red flags and "repair work in progress" boards were out on the Saturday morning, but, according to the evidence for the plaintiff, were removed when the workmen stopped work at mid-day on Saturday. I think it must be taken that carriages could get along the roadway on Saturday afternoon, but that the new verge was not completed, as the waste soil had to be removed and was in fact going to be, and was, removed on the Monday morning.

There is abundant evidence that the children of the neighbourhood used to play about the works when there was no one there, but, if there were workmen there, the children were always warned off.

Such being the case, on the Saturday afternoon, after the workmen had gone, two boys, Ruddlestone, aged nine, and McNeill, aged ten, were sitting on the new wall, having presumably walked up the heap to get there. Each boy admitted that he had been told by the workmen not to play about there, "because they would tumble over," and that "his mother had told him not to go on the wall." To them there came the infant plaintiff Liddle, aged just seven, who also had been "warned off the job" by Linton, a workman. He was going on an errand for his mother from his home some distance off to Mrs. McNeill's house. When he saw the two boys, he started to run on to them and got up and sat on the wall between them, facing the road. He began to talk to them "about the bees and showing the boys how the bees were flying about, and waving his arms, when he fell over backwards." No further information could be obtained as to why, when sitting on a substantial wall, with his feet resting on the heap, he should fall over backwards.

The first question, and the principal question, argued for the defendants, is whether these facts show any legal liability in the defendants to the boy. The only connection of the heap of waste soil with the matter was that it made it easier for the boy to get to the wall and to sit on it, and provided a safer seat for him, because he could and must use it as a foot rest. The wall was a perfectly substantial wall and, if the boy sat between the castellations, he would be in a kind of armchair with arms to take hold of. The defendants took no action which injured the boy, such as starting a wire rope, as in *Excelsior Wire Rope Co.* v. *Callan* (1), or felling a tree when the boy was near, as in *Mourton* v. *Poulter.* (2)

The defendants certainly had not invited the boy to sit on the wall; they had warned him off the job. The learned judge seemed to think from his questions to the witnesses, and a passage in his summing up, that the best way to get a boy to do something was to tell him not to do it; but he could hardly have seriously meant that prohibition was an additional ground of legal liability in the prohibiter.

The cause of action, if any, must be that the defendants created an attractive and dangerous combination which led the boy to go into danger and took no sufficient steps to prevent the boy from being tempted, and so led into danger. The question is whether the facts can possibly justify this conclusion.

The position of an adult who suffers injury while on the land of another depends on which of one of three classes he falls into: (1.) a trespasser, who has no right on the land; (2.) a licensee, whether bare or with an interest; (3.) an invitee, who may be in a better position, if he pays for his entrance.

The duties owned by the landowner to an adult are to be found discussed at length by Lord Hailsham in *Addie & Sons (Collieries)* v. *Dumbreck* (3); by Hamilton L.J. in *Latham* v. *Johnson* (4), and by myself in *Hayward* v. *Drury Lane Theatre.* (5)

In the present case it was agreed that, if the plaintiff had been an adult, he would have no cause of action. The danger of falling off the wall was, in daylight, obvious; the heap would have nothing to do with the fall; whether the grown up man was a trespasser or a licensee, the owner of the wall had on the facts no legal obligation to him. But the plaintiff was a child of seven years. English law has been very ready to find remedies for the injuries of children—per Hamilton L.J. in *Latham* v. *Johnson.* (6) Holmes J., whose views on English as well as on American law are entitled to the most

(1) [1930] A. C. 404.
(2) [1930] 2 K. B. 183.
(3) [1929] A. C. 358, 364, 365.
(4) [1913] 1 K. B. 398, 410.
(5) [1917] 2 K. B. 899, 913.
(6) [1913] 1 K. B. 398, 413.

Scrutton L.J.

respectful consideration, has said in *United Zinc and Chemical Co.* v. *van Britt* (1): "Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied." Again, on the following page he says: "There can be no general duty on the part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

From that case, where the Supreme Court of the United States decided by six voices to three in favour of the landowner and against the child, it appeared that there was some conflict both in the United States and in England between a view which may be called the "humanitarian" view, that a child which has no knowledge or discretion to make it capable of contributory negligence must be guarded by the landowner on whose ground it is allowed or tempted to enter, and the "hard" or "Draconian" view, that a child must trespass at its own risk and, if it is so young as not to appreciate what it is doing, it is for its parents, and not for the landowner on whose land it enters without invitation, to protect it.

I agree with the view of Mr. Justice Salmond in his work on Torts (7th ed.), at p. 472, where he says "The humanitarian impulse which prompts such decisions as that of *Railroad Co.* v. *Stout*" (2)—that is a United States decision—"and seeks to impose upon the occupiers of premises a legal duty in the guardianship of infant trespassers will in the long run do more harm than good. The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company."

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(1) (1922) 258 U. S. 268, 275.

(2) (1873) 17 Wall. 657.

I also agree with the passage in Pollock on Torts (13th ed.), p. 544, where it is said: "Some decisions in America have gone to great lengths in favour of infant licensees and even trespassers, and have been much discussed. In England they have been followed only to this extent, that an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them."

Confusion was temporarily introduced into the law of England by the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (1), where a small child recovered against a railway company damages for injuries received by its playing on an accessible and moveable turntable which the railway company knew was frequented by children, and as to which it did nothing to prevent them from coming to the danger. I think it is now established by the judgment in *Latham* v. *Johnson* (2) and the explanation of *Cooke's* case (1) by Lord Atkinson in *Glasgow Corporation* v. *Taylor*, (3) that *Cooke's* case (1) must be treated as the case of a child impliedly licensed to use a plaything which was, for a child, a trap.

In *Hardy* v. *Central London Ry. Co.* (4) this Court dismissed the claim of a child of five who, being taken, not for the purpose of travelling, by an older boy into a station where there was an escalator, from which children were driven away whenever they were seen, caught his fingers in the band of the escalator. He was treated by the Court as a trespasser. In that case I stated the position of a child trespasser thus: I am reading from *Addie's* case (5) where Lord Hailsham cites what I said: "If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending

(1) [1909] A. C. 229.
(2) [1913] 1 K. B. 398.
(3) [1922] 1 A. C. 44, 53.
(4) [1920] 3 K. B. 459.
(5) [1929] A. C. 358, 367.

to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers." Lord Hailsham in the House of Lords said : " My Lords, I believe that that sentence accurately summarises the English law."

In my opinion, to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable.

If that is the law, do the facts in this case fall within it ? The defendants were doing road repairs and might lawfully exclude the public from the portion of the road being repaired. In the case of new construction, not repair, the public had no right to go on the land on which the road was constructed till it was dedicated, and while under construction it was not dedicated. In my view, the child, in going up the heap, left there in course of construction of the road, and in sitting on the wall, was a trespasser.

When the jury answered the question : " Was the infant plaintiff lawfully using the highway ? " by saying " Yes," they had no direction on this point at all, and I cannot think that to walk up a heap left there during road construction and sit for a talk on a four and a half foot wall could be reasonably held to be a lawful use of the highway. Again, the jury were asked : " Were the defendants negligent in leaving the heap of soil next the wall ? " Negligence involves a duty which is not complied with, and the jury got no direction as to what the duty of the defendants was ; and I see no evidence that the judge ever considered what the duty was, except that he says : " Would a reasonable man, knowing the neighbourhood and what children are, have left the heap there ? " That question, if applied to the escalator, might be answered against the railway company. The accident was in broad daylight on work not yet completed, and the defendants warned the children off whenever they were seen. I do not think there is any evidence on which a reasonable jury could answer " Yes " to that question.

Another set of questions were : " (2.) Were the acts of the defendants an allurement or invitation to the plaintiff to go on the wall ? (3.) Was the heap of soil a trap to the infant plaintiff ? (4.) Did the heap of soil and the wall constitute a thing dangerous in itself if meddled with ? " I can only deal with this group of questions in the way in which Hamilton L.J. dealt in *Latham* v. *Johnson* (1), with a heap of building rubbish which crushed the hand of an infant plaintiff. The jury had found that the defendants ought to have known that there was a likelihood of children being injured by the stones, and the Lord Justice said (2) : " But it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

The alternative way of putting the case was to say that the heap was a nuisance on the highway and caused the accident. It was said to be a nuisance because it was an easy way of access to the wall ; but (1.) the verge on which the heap was had not yet been cleared and dedicated to the public, and (2.) if the heap is treated as a danger adjoining the highway, I think under the decision in *Barker* v. *Herbert* (3) it did not cause the accident. In that case there was a break in the railings surrounding an area next a highway, and a child fell into the area. The plaintiff's case was that he had injured himself by falling through the gap ; the defendant's case that he got through the gap and clambered along inside the railings and then fell through a slate breaking. The

(1) [1913] 1 K. B. 398. (2) Ibid. 416.
(3) [1911] 2 K. B. 633.

jury found that this was how the accident happened, and the Court of Appeal held that the gap was not the cause of the accident. I do not think the temporary heap on undedicated land could be a nuisance, and it certainly did not cause the plaintiff to fall off the wall on which he was safely sitting before he began to antic.

I am, therefore, of opinion that no facts were proved that would give a cause of action against the defendants. The judgment for the plaintiff must be set aside and judgment entered for the defendants with costs here and below.

I should add that, if I had not come to this conclusion, I should have ordered a new trial, as, in my opinion, the conduct of the case by the judge below was unsatisfactory, and such directions as he gave to the jury were quite insufficient.

GREER L.J. This is an appeal by the defendants against a verdict and judgment in favour of the plaintiffs in an action tried by Swift J., at Leeds, whereby the sum of 1500*l.* was awarded to the infant plaintiff for personal injuries, and the sum of 62*l.* 4*s.* 4*d.* to his father in respect of expenses incurred by him in consequence of the injuries to the infant plaintiff.

The appellant defendants ask this Court to set aside the verdict and judgment, and enter judgment for the defendants on the ground that there was no evidence fit to be left to the jury of any liability on the part of the defendants to the plaintiffs, and, alternatively, they ask for a new trial on the ground of misdirection.

The plaintiff, a boy seven years old, received serious injuries by falling from a wall which the defendants had made in the course of improving and reconstructing one of the main roads in their district.

The material facts are as follows: the road in question led from Whitby to Grosmont in the part of Yorkshire subject to the defendants' jurisdiction, and before alteration had a very awkward turn in the neighbourhood of some cottages about a quarter of a mile from Grosmont. Between the road on the right hand side and the adjoining fields there was an old fence from which the land gradually sloped to a meadow. The defendants decided to make a broader sweep to the road at this point, and to do this they had to widen the road and fill up the slope in the ground so as to bring the added part of the road up to the same level as the old part. They made a concrete foundation for the new part of the road, and after providing for a grass verge beyond the metalled part of the road they erected a stone wall with a castellated top, and made a retaining wall under the new part of the road with the result that instead of the comparatively easy slope that there had been from the edge of the old fence there was a precipitous fall from the new wall to the field below. The nature of the additions to the road and of the condition of things left after the road was made on the field side of the road are indicated by the plan and the three photographs put in at the trial.

The evidence leaves no doubt that any infant sitting, standing or playing on the wall, and getting over-balanced would be likely to sustain very serious injuries.

On Saturday afternoon, September 24, 1932, the state of progress of the work on which the defendants were engaged was that at the material place they had finished putting in the foundations, the metalling of the road, and the building of the wall, but in connection with their operations there was a month's work still to be done, and for the purposes of the work they had placed on the grass verge a mound of earth which had remained there for three or four days before the accident, but which they removed on the Monday following the accident. They must have purchased under their powers the necessary land to increase the width of the road, and in so far as the work was still incomplete they cannot be said to have dedicated the new land to the public as a highway, but on the Saturday they removed the notices that had been placed at some distance from the approaches to the place in question, and I have no doubt that all the metalled part of the road became dedicated to the use of the public as a highway, but inasmuch as they were still using for the purposes of their work the grass verge, I do not think that the grass verge had at the date of the accident become part of the highway. It was land adjoining the highway which had become the property of the defendants, and which, no doubt, they intended when their work was completed should become part of the highway.

The boys of the neighbourhood had been warned by the defendants' workmen not to go on the pile of earth or climb on the wall, but notwithstanding the warning they did so, though when seen they were chased away. The two boys who were called apparently did not know whether the infant plaintiff had been so warned, but one of the workmen called for the defendants said he had warned the infant plaintiff off the part of the work where the danger was. By this I think it is clear that he meant the place where the mound was on the road side of the wall and the precipitous descent on the other. The little boy himself was not called to give evidence, and therefore the evidence of Linton must be taken as uncontradicted evidence.

On the afternoon in question the infant plaintiff was going on a message with some milk cans from his home, a quarter of a mile away, to a house which was a short distance beyond the place where the accident happened. Passing the wall at the point where the mound was he saw two little boys of his acquaintance, Eric Ruddlestone and John McNeill, who were a little older than himself, sitting and talking on the wall near where the mound was. They had climbed there by means of the soil. One of them said that the wall was too high for them to get on to it if it had not been for the heap of soil. The plaintiff as he approached the place, seeing his two friends there, climbed up the same way as they had done and sat between them on the wall and began to talk to them. He appears to have been saying something about how bees fly, and stretching out his arms overbalanced himself and fell backwards over the precipitous descent to the field which is shown on photograph "B," and thereby received the serious injuries in respect of which the jury have awarded him 1500*l*.

The plaintiff's claim was based (1.) on negligence, and (2.) on nuisance. At the conclusion of the evidence for the plaintiff the defendants' counsel submitted that there was no case for him to answer, and the learned judge ruled against him. The learned judge indeed took the view that there was evidence that this combination of the mound of soil and the wall was something that the jury were entitled to hold was an allurement to young children, and that on the authority of such cases as *Lynch* v. *Nurdin* (1), and *Cooke* v. *Midland Great Western Railway of Ireland* (2), the defendants would be liable if the jury found that they had failed to exercise reasonable care to prevent any harm coming to the children, who they knew were likely to get on the wall at a place where it was dangerous to young children.

The trial took place on circuit, and the learned judge, having made up his mind that the case was one which ought to go to the jury, was not prepared to listen to any lengthy citation of cases which he thought probably turned on different facts from the facts proved in the case before him.

Certain questions were agreed by the counsel on both sides, and as the judge left these questions to the jury, it must be taken that the questions had his approval. [The Lord Justice read these and continued :] It was contended on behalf of the appellants that on the proved facts the infant plaintiff was a trespasser at the time that he fell from the wall, or that he was, if not a trespasser, at most a licensee. If he was a trespasser they were clearly not liable, as they had not constructed the dangerous place with a view of causing an injury to him or, indeed, in contemplation of him at all. They contended also that, even if he were a licensee, the danger was an obvious and not a hidden danger, and the only obligation on the defendants, so far as licensees were concerned, was not to subject them to a hidden danger without warning them. This argument was supported by reference (inter alia) to the following authorities : *Latham* v. *Johnson* (3) ; *Addie & Sons (Collieries)* v. *Dumbreck* (4) ; *Hardy* v. *Central London Ry. Co.* (5), and *Donovan* v. *Union Cartage Co.* (6)

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(1) 1 Q. B. 29.

(2) [1909] A. C. 229.

(3) [1913] 1 K. B. 398.

(4) [1929] A. C. 358.

(5) [1920] 3 K. B. 459.

(6) [1933] 2 K. B. 71.

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For the respondents it was contended that the "arrangement or contraption," as it was called, consisting of a mound of soil alluring children to climb up to the wall and sit or play on it, was, within the authorities, such a state of circumstances as raised a duty on the defendants to take reasonable care to see that infant children doing what every reasonable person would expect them to do came to no harm. They contended that the plaintiff was not a trespasser, or indeed merely in the position of a licensee, but was lawfully using the highway when sitting on the wall. In support of their arguments they relied on *Lynch* v. *Nurdin* (1); *Cooke* v. *Midland Great Western Railway of Ireland* (2); *Harrold* v. *Watney* (3), and *Excelsior Wire Rope Co.* v. *Callan.* (4)

In my judgment this appeal must succeed. I can quite understand the force of the argument that in a case such as this the law ought to cast a duty on the defendants to exercise reasonable care to prevent damage happening to infant children at a place adjoining a high road which they have left in a state which is likely to allure children into a position of danger, and at one time I was inclined to think that the law as laid down by Lord Denman C.J. in *Lynch* v. *Nurdin* (1) and by Lord Macnaghten in *Cooke* v. *Midland Great Western Railway of Ireland* (2), would support such a proposition, but I am satisfied on going further into the authorities that the modern cases make it necessary to hold that the law imposes no such duty on people in the situation of the defendants in this case.

The rules of law applicable to claims by adults or infants for damage occasioned through alleged negligence on the part of the owner or occupier of the land or property on which the injured person was at the time he received his injuries have been often considered by the Courts. The decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland* (2) seemed to have cast doubt on the well established principles applicable to such cases, and to have extended the liability of owners or occupiers to infant licensees and to

(1) 1 Q. B. 29.
(2) [1909] A. C. 229.
(3) [1898] 2 Q. B. 320.
(4) [1930] A. C. 404.

infant trespassers. The decision in that case must, of course, be treated as decisive of the propositions of law necessarily involved in it, but it is now certain that some of the observations in the speech of Lord Macnaghten cannot be accepted as accurate statements of the law. In the course of his speech Lord Macnaghten is reported to have said (1): "The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?" Later decisions of the Court of Appeal and the House of Lords make it necessary for us to treat the observations quoted above as dicta going beyond what was necessary for the decision of the case.

The law has now been stated in unmistakeable language by Lord Hailsham L.C. and Lord Dunedin in *Addie & Sons (Collieries)* v. *Dumbreck* (2) in the House of Lords, and by Lord Sumner, then Hamilton L.J. in *Latham* v. *Johnson*. (3)

There are three categories, and only three categories, in which any person meeting with an accident, causing personal injuries, on the land or property of another can be placed for the purpose of determining a claim against the latter for damages for negligence. Such a person may be an invitee, a licensee, or a trespasser. Children have not by law been placed in a different category. Their rights and the liabilities of the landowner or occupier fall to be determined by deciding in which of the three categories the proved facts place them.

The law applicable to claims by children in each of these categories is stated by Lord Hailsham in *Addie's* case (4), as follows: "The duty which rests upon the occupier of premises

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(1) [1909] A. C. 234.
(2) [1929] A. C. 358.
(3) [1913] 1 K. B. 398.
(4) [1929] A. C. 358, 364, 365.

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towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

I have no doubt about the category in which the plaintiff in the action under appeal must be placed. When he fell off the wall he was a trespasser. It was not, and could not be, contended, that he was an invitee, that is, a person invited to come on to the wall for some purpose in which the defendants and the plaintiff were both interested. To justify any one to be treated as an invitee he must be on the land for some purpose in which he and the proprietor have a joint interest: see per Lord Dunedin in *Addie & Sons (Collieries)* v. *Dumbreck.* (1)

Was the plaintiff a licensee? Was he on the wall with the express or tacit permission of the defendants' servants in charge of the task of reconstructing the road? It seems to me quite certain that he was not. This is not like the cases in which the Courts have drawn the inference of tacit permission from the defendants' knowledge of continuous resort to their property without any real objection by them. So far from tacitly permitting children to play on the wall and its approaches while their work was in progress, the defendants' servants drove them away when they had an opportunity of doing so. The plaintiff's two friends admitted this, and the only evidence as to the plaintiff himself was the unchallenged statement of Linton that he had warned the plaintiff not to come on this part of the work. It is impossible to hold that the plaintiff was a licensee. "When a proprietor protests and goes on protesting, turning away people when he meets them . . . . and giving no countenance in anything that he does to their presence there, then I think no Court has a right to say that permission must be implied." I quote those words from Lord Dunedin's speech in *Addie's* case. (1)

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(1) [1929] A. C. 358, 371.

In my judgment there was no evidence to be left to the jury that the plaintiff was either an invitee or a licensee. The defendants owed no duty to him except the duty they owe to trespassers. To quote the words of Lord Buckmaster in *Addie's* case (2), "If it once be held that the child was a trespasser, innocent as the trespass was, there was no legal duty cast upon the appellants to afford protection against the danger which they must have known use of the land by the children almost necessarily involved."

In my opinion the grass verge on which the mound of earth had been temporarily placed had not become part of the highway dedicated to the use of the public for the lawful exercise of rights of way; but this is of little moment, because, assuming that it had become part of the highway, the wall was certainly not part of the highway. If it was, the public would have had the right to walk on it. It was clearly neither suitable nor intended for such purpose. It was erected as a boundary to the highway for the purpose of protecting people using the highway for the lawful purpose of passage and re-passage.

I may add that, even if the plaintiff was a licensee, he

(1) [1929] A. C. 358, 372. (2) Ibid. 380.

would still not be entitled to recover, as the danger was an open and not a " concealed " danger. It is well established law that licensees " must take the premises as they find them apart from concealed sources of danger ; where dangers are obvious they must run the risk of them." It must not be forgotten that in the case in which these words were quoted by Lord Dunedin, the claim was made on behalf of a boy of four years of age.

In *Latham* v. *Johnson* (1) and *Addie & Sons* (*Collieries*) v. *Dumbreck* (2) Lord Sumner and their Lordships who decided the latter case expressly put the decision of the House of Lords in the case of *Cooke* v. *Midland Great Western Railway of Ireland* (3) on the ground that the liability of the defendants was a liability arising by reason of injuries caused by a source of danger which was a trap or concealed danger to a child of tender years who was in the place of danger by the leave and licence of the defendants. The effect of *Addie's* case (2) and *Latham* v. *Johnson* (1) is to show that the actual decision in *Cooke* v. *Midland Great Western Railway of Ireland* (3) is consistent with the law as laid down in the two cases based on a long stream of authority, and that we must regard the general proposition I have cited from the speech of Lord Macnaghten as going beyond, and as inconsistent with, well established rules of law.

The respondents' counsel put his case in another way. He argued that the facts of this case are such that the considerations applicable to the liability of a landowner to visitors who are either invitees, licensees, or trespassers, have no application to the case of a child getting into danger on or near the highway so long as what he is doing is reasonably incident to the lawful use of the highway, and he cited *Harrold* v. *Watney* (4) in support of his contention that the defendants were liable. It may well be that a person, whether child or adult, leaning against a boundary fence adjoining a highway is doing something incidental to the exercise of his rights of passage along the highway ; but, in my judgment, any one

(1) [1913] 1 K. B. 398.
(2) [1929] A. C. 358.
(3) [1909] A. C. 229.
(4) [1898] 2 Q. B. 320.

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sitting on such a wall as there was in the present case cannot be held to be doing something reasonably incident to the use of the highway. From the moment he sat on the wall the infant plaintiff was a trespasser using the wall for purposes for which it was never intended. Moreover, the rotten fence in *Harrold* v. *Watney* (1) was a nuisance, being a dangerous trap for those using the highway. In the present case the wall was a good wall completely satisfactory for the purpose for which it was used, and the heap of earth was placed where it was by the defendants' servants in the lawful course of the work they were doing for the improvement of the highway.

Lynch v. *Nurdin* (2), on which also the respondents relied, does not help them. That was a case of nuisance, and the question involved in the case was whether the damage to the infant plaintiff could rightly be said to have been caused by the wrongful act of the defendant. As the act of the infant plaintiff in getting into the cart and the act of the other child who set it in motion were acts which any one would expect to follow as a probable result of the defendants' wrongful act, the defendants were held liable. The story began with a wrongful act by the defendant. Here there was no wrongful act by the defendants unless it be a wrongful act not to prevent children from trespassing. We have the high authority of Lord Sumner, then Hamilton L.J., in *Latham* v. *Johnson* (3), for this explanation of *Lynch* v. *Nurdin* (2): "Children's cases are always troublesome. English law has been very ready to find remedies for their injuries. Scotch law has been less indulgent: see *Campbell* v. *Ord & Maddison* (4); *Gavin* v. *Arrol & Co.* (5); *Cass* v. *Edinburgh and District Tramways Co.* (6) They are the commonest cases of the general rule, which is as old as *Scott* v. *Shepherd* (7), that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook* (1); *Lynch* v. *Nurdin* (2)) that injury would not have occurred. Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a causa sine qua non, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief."

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(1) [1898] 2 Q. B. 320.
(2) 1 Q. B. 29.
(3) [1913] 1 K. B. 398, 413.
(4) (1873) 1 R. 149.
(5) (1889) 16 R. 509.
(6) (1909) S. C. 1068.
(7) (1773) 3 Wils. 403; 2 W. Bl. 892.

It was also contended for the respondents that the heap of soil near the wall constituted a nuisance to the highway, and the accident and injuries to the infant plaintiff were not too remote to be regarded as having been caused by the nuisance. A nuisance must be something which is either an obstruction to the right of passage of His Majesty's subjects upon the highway, or something which is likely to endanger persons lawfully using the highway. In my judgment the defendants were not guilty of leaving a nuisance on the highway, (1.) because the grass verge had not become part of the highway, and (2.) because it did not constitute a danger to those lawfully using the highway.

As in my view the plaintiffs failed to give any evidence of a breach by the defendants of any duty imposed upon them by law, I find it a little difficult to address my mind to the question whether the accident and injuries suffered by the infant plaintiff were directly caused by a breach of duty, but I think it right to say that, if the duty was as wide as the learned judge appears to have thought it was, or as wide as Lord Macnaghten's words in *Cooke* v. *Midland Great Western Railway of Ireland* (3) appear to imply, I should be inclined to think that the infant plaintiff's accident and injuries could in law be deemed to be the direct consequence of the breach of such duty, notwithstanding the fact that the infant plaintiff did something which he would not have done if he had not been guilty of some act which, though wrongful in an adult, is the kind of act which a private individual of common sense and ordinary intelligence might reasonably suppose would happen in the case of an infant of such a tender age as to be regarded in law as incapable of contributory negligence.

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(1) 4 Bing. 628.

(2) 1 Q. B. 29.

(3) [1909] A. C. 229.

For the reasons stated above I think there was no evidence of any breach of duty by the defendants to the plaintiffs, and that the judge ought to have entered judgment for the defendants. Therefore, this appeal should be allowed with costs here and below.

SLESSER L.J. I am of opinion that this appeal must be allowed, for the sufficient reason that the plaintiff, having been a trespasser at the place where he met with his accident, has failed to show that the defendants injured him intentionally or put dangerous traps for him intending to cause injury.

I arrive at the conclusion that the plaintiff was a trespasser for the following reasons. I will assume in favour of the plaintiff that the verge of the recently widened highway upon which the earth had been thrown, on which the plaintiff had mounted the wall, was itself a part of the highway. It appears from the evidence that the notices stating that the road was being repaired had been removed on the Saturday afternoon of September 24, 1932, before the time of the accident, which was the same day, and it may be that in these circumstances the public had been invited to use the newly widened part of the highway and the verge thereof, but I am unable to come to the conclusion that it was any part of the rights of the plaintiff as a passenger upon the highway to leave it, even in its wider extent, and seat himself for purposes of amusement upon the retaining wall.

In the language of Lopes L.J. in *Harrison* v. *Duke of Rutland* (1): "If a person uses the soil of the highway for

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(1) [1893] 1 Q. B. 142, 154.

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any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel." In *Reg.* v. *Pratt* (1) Erle J. said: "I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston* v. *Payne.*" (2) It may well be, as Lord Esher, the Master of the Rolls, said in *Harrison* v. *Duke of Rutland* (3) that "highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." An example of such reasonable use is given by A. L. Smith L.J. in *Hickman* v. *Maisey* (4), where "a man, while using a highway for passage, sat down for a time to rest himself by the side of the road"; and I think that in the present case, if the plaintiff could have shown that he sat upon this wall for the purpose of resting himself as a passenger, it would have been difficult to say that he was a trespasser; but the evidence is otherwise. The plaintiff himself was not called, but it is clear from the evidence of the boys who were called, who were with him at the time of the accident, that they went upon the mound and upon the wall to play and not to rest in their passage along the highway; and the question of intent is material, for as Collins L.J. says in *Hickman's* case (5), "If a person is found using a highway in a manner which is altogether outside the purpose for which it was dedicated, that raises the question with what intention he went on the highway; for the law judges by his subsequent action what his original intent was." The case of *Earl Coventry* v.

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(1) (1855) 4 El. & Bl. 860, 867.
(2) (1795) 2 H. Bl. 527.
(3) [1893] 1 Q. B. 142, 146.
(4) [1900] 1 Q. B. 752, 756.
(5) Ibid. 758.

Willes (1), seems to suggest that there would be no general right to stay upon a road in order to witness races on Newmarket Common, and, indeed, the only question occasioning any doubt on this matter is the extent to which acts done upon the highway may or may not be reasonably incident to its user. It is to be observed that in *Hickman* v. *Maisey* (2) A. L. Smith L.J. seems to think that, if a man took a sketch from a highway, no reasonable person would treat the act as an act of trespass, whereas in *Harrison* v. *Duke of Rutland* (3) Kay L.J. suggests that: "If by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser. But no one in his senses would bring an action against him for an occasional trespass of that kind." Lord Esher in the same case indicates (4): "Cases might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose." A person leaning up against a fence by the side of the highway is not necessarily a trespasser: per A. L. Smith L.J. in *Harrold* v. *Watney*. (5)

In the present case the accident took place by the plaintiff falling off a wall by the side of the highway, a wall which was itself the property of the appellant local authority, but such a wall would come within the principles laid down in *Turner* v. *Ringwood Highway Board* (6), where it was decided that trees growing by the side of the highway belonged to the owner of the soil. Thus by reason of the effect of user for purposes unconnected with passage, if the wall be treated as part of or incident to the highway or if the conclusion, as I think it should be, is that the wall was not part of the highway, in any event the plaintiff, in getting upon it, was unlawfully trespassing upon the property of the appellant county council.

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(1) (1863) 9 L. T. 384.

(2) [1900] 1 Q. B. 752, 756.

(3) [1893] 1 Q. B. 142, 156.

(4) Ibid. 147.

(5) [1898] 2 Q. B. 320, 322.

(6) L. R. 9 Eq. 418.

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It was not suggested here that there was any direct intention to injure, but it is said, and so found by the jury, that the presence of the mound and the wall in conjunction constituted an allurement or a trap. This is not a case of an allurement arising after the child has entered upon the wall with leave or as of right, but is the contrary case mentioned by Hamilton L.J. in *Latham* v. *Johnson* (1) of a child that " will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so."

The finding of the jury, therefore, that the heap of soil placed against the wall was in the nature of a trap or allurement will not avail him if he was a trespasser, unless such trap was put there with intention to injure, which is not suggested in the present case. This is clear from the judgment of this Court in *Hardy* v. *Central London Ry. Co.* (2), where the matter is thus put by Scrutton L.J.: " If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers." It may be said that this view is inconsistent with the decision of the House of Lords in the well known case of *Cooke* v. *Midland Great Western Railway of Ireland* (3); but when that case is examined, it is clear, as appears in the speech of Lord Atkinson (4), that the children there were on the railway company's land with the leave and licence of the defendants.

The distinction between a child who is a trespasser and one who is not in this matter is made finally clear by Lord Hailsham L.C., in *Addie & Sons (Collieries)* v. *Dumbreck* (5), where he says: " The decision in *Cooke's* case (3) rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap; it therefore throws no light upon the question as to any duty owed by the occupier of premises to a trespasser." His lordship goes on to express full agreement with the judgment of Hamilton L.J. in *Latham's* case (1) where, as I have pointed out, the distinction is clearly made. He cites many other cases to the effect that, where the children were trespassers, it is necessary to show an intention to injure, and says that there are none to the contrary effect; nor do there appear to be any, unless we find such authority in *Lynch* v. *Nurdin* (2) where judgment was given for the plaintiff, although he was a trespasser on the defendant's cart. Although *Lynch* v. *Nurdin* (2) remains an authority on the question of contributory negligence of children, the present state of the law seems to me to justify me in declining to think that it binds me to-day to say that the defendants are liable when they do not put a trap intentionally or intend to injure if the plaintiff is a trespasser.

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(1) [1913] 1 K. B. 398, 416.
(2) [1920] 3 K. B. 459, 473.
(3) [1909] A. C. 229.
(4) Ibid. 239.
(5) [1929] A. C. 358, 366.

The Divisional Court in the recent case of *Donovan* v. *Union Cartage Co.* (3) seeks to distinguish *Lynch* v. *Nurdin* (2) on the ground that in *Donovan's* case (3) the children climbed upon an unhorsed van and that there was no inherent danger therein, whereas in *Lynch* v. *Nurdin* (2) the cart had a horse attached to it; but they do not seek to support their finding for the defendants on the ground that the children were trespassers, though Acton J. quotes the speech of Lord Atkinson in *Cooke's* case (4), who extends the possibility of liability to cases where the person is a trespasser at the moment the accident occurred, and Acton J. appears there to approve *Lynch* v. *Nurdin* (2) on the question of the rights of trespassers; but in so far as Lord Atkinson was there speaking obiter (see the same noble Lord's observations in *Glasgow Corporation* v. *Taylor* (5)), I prefer to distinguish *Cooke's* case (4) on the ground that the child was a licensee

(1) [1913] 1 K. B. 398.
(2) 1 Q. B. 29.
(3) [1933] 2 K. B. 71.
(4) [1909] A. C. 229, 237.
(5) [1922] 1 A. C. 44.

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and hold that the problem was set at rest in the House of Lords in *Addie's* case. (1)

On the view which I have here expressed, the second ground of appeal, that the conjunction of the soil and the wall was not the cause of the accident, but that the infant caused his own injury by waving his arms about in imitation of an insect, while he was sitting on the wall, does not arise; but, in case this appeal goes further, I would say that in the matter of the direct causation of the plaintiff's injuries by the negligence of the defendants, I think it was a matter of degree essentially for the jury and, in the absence of any clear evidence why this child did fall off the wall, having regard to the youth of the plaintiff, I think the jury were entitled to come to the conclusion that it was an essential causal result of the child being upon the wall. This view is consistent with the opinions expressed in *Harrold* v. *Watney* (2), where the test was applied: " Ought what the child did to have been present to the mind of the person who created (in that case) the nuisance as a probable result of his act? " : per Vaughan Williams L.J. (3)

Here there was not only evidence from Ruddleston, one of the boys called, that he did not see what it was that made the plaintiff fall backwards from the wall, but there was also that of Parkin, the foreman, who had told the children not to go on the wall, because they would tumble over; so that there was evidence that the appellants' foreman did foresee that being upon the wall might be a cause of danger to the children and, therefore, if he were under a duty to guard against that danger, the mere fact that the accident arose in one or other of the particular ways in which a child might fall off a wall does not seem to me to constitute a novus actus interveniens and, if the defendants were otherwise legally liable in placing the heap of soil against the wall without proper precaution, I think that the jury were entitled to find that this action on their part caused the plaintiff's injuries.

The direction on this matter to the jury seems to me to

(1) [1929] A. C. 358.

(2) [1898] 2 Q. B. 320.

(3) Ibid. 325.

have placed the question sufficiently before them so that they knew on this point what they had to consider. Thus, at the beginning of his summing up on this matter the learned judge presents the arguments for the parties thus: For the plaintiff: "I have been damaged as a result of their negligence"; and the defendants say: "If you had been a sensible little boy of six instead of a foolish little boy of six, you would never have been hurt and it is your fault and not ours." And then again: "Did the negligence of the defendants cause the plaintiff's injuries? If you think that, although they were negligent, it had nothing to do with the causing of Kenneth Liddle's injuries, then you will say so by answering that question in the negative."

Finally, it was sought to put the case upon nuisance. I do not think that, even if it were a nuisance to leave this earth upon the verge of the highway, it could in any way assist the plaintiff in this case. The plaintiff is not complaining of an obstruction in the highway which impeded his right of passage thereon and, although the judge quoted a definition of nuisance to the jury, he did not, I think, sufficiently distinguish between the endangering of the amenities of the public, as such, and this injury caused to this child, if at all, not as a member of the public but as an individual allurement into danger.

I cannot see that on any view this action could properly be founded upon nuisance and I decide this appeal in favour of the appellants upon the ground, as I have said, that once it is established that the plaintiff is a trespasser there is no evidence which can make the defendants liable for his injuries according to the requirements now established in such cases by the authorities.

Appeal allowed.

Solicitors for appellants: *Lambert & Hale, for H. G. Thornley, Northallerton.*

Solicitors for respondent: *Reed & Reed, for Colin Brown & Co., Whitby.*

J. S. H.

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FLOWER *v.* EBBW VALE STEEL, IRON & COAL COMPANY, LIMITED.

Master and servant—Accident to servant—Dangerous machine insufficiently fenced—Action by servant against master based on breach of statutory duty—Contributory negligence—Competence of defence.

Contributory negligence of the plaintiff is a valid defence to an action founded on breach of a statutory duty by the defendant.

Caswell v. *Worth* (1856) 5 El. & Bl. 849; *Senior* v. *Ward* (1859) 1 El. & El. 385; and *Dew* v. *United British Steamship Co.* (1928) 139 L. T. 628, followed.

Groves v. *Lord Wimborne* [1898] 2 Q. B. 402; *Rudd* v. *Elder Dempster & Co.* [1933] 1 K. B. 566; and *Wheeler* v. *New Merton Board Mills Ld.* [1933] 2 K. B. 669, dicta approved and applied.

Observations as to the question of fact to be determined where the defence of contributory negligence is raised (infra pp. 139 and 151).

Observations as to the meaning of the expression "obiter dicta" (infra p. 154).

ACTION tried by Lawrence J. without a jury.

The defendants, the Ebbw Vale Steel, Iron & Coal Co., Ld., were the owners and occupiers of a metal sheet and galvanizing factory at Ebbw Vale in the county of Monmouth.

The plaintiff, Mr. C. Flower, was employed by the defendants in working a sheet roller leveller machine and in cleaning it from time to time.

The machine consisted of seven upper and six lower rollers. The two sets of rollers were less than an inch apart at their nearest points, and they revolved in opposite directions, turning towards each other at the front of the machine. When a sheet of metal was introduced between the front rollers it was drawn between the two sets of rollers, and, having been thus levelled, was expelled at the back of the machine. The two sides of the machine were held together in front at the top by a black iron bar parallel to the rollers, the upper side of that bar being slightly above the level of the upper rollers. As a protection to the workmen a copper bar was placed across the front of the machine below the level of the front top roller. The height of the machine was 3 feet 0½ inches from the ground to the upper side of the black bar. The distance between the top of the copper bar and the bottom of the black iron bar was 2¼ inches.

On February 27, 1933, while the machine was in motion, the plaintiff was cleaning it from the front with cotton waste. After cleaning the top rollers from above, he put his left hand with waste upon it under the copper bar and against the front top roller, in order partly to see better and partly to exert greater pressure upon the roller. In these circumstances his hand was drawn into the " bite " between the front rollers and was so seriously crushed that it was found necessary to amputate it.

On April 8, 1933, the plaintiff brought the present action against the defendants claiming damages for injury to himself from the negligence of and breach of statutory duty by the defendants and/or their servants or agents in not securely fencing and in not making safe certain machinery at their factory.

The plaintiff in his statement of claim alleged inter alia (para. 2), that the machine in question was a dangerous part of the machinery at the defendants' factory, and ought pursuant to the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10, to have been securely fenced by the defendants, or in such position or of such construction as to be equally safe to all employees and workers in the factory as it would have been if it had been securely fenced ; but that it was not of such position or construction as aforesaid and was negligently left by the defendants in a dangerous state, inasmuch as there was no proper protection for the hands of those working on the machine ; and (para. 3) that in consequence of the defendant's breach of their statutory duty and/or negligence the plaintiff was caught by the machine with the result that he lost his left hand, suffered great pain and shock, and was permanently and seriously incapacitated for work.

The defendants in their defence stated, inter alia (para. 2), that every allegation in para. 2 of the statement of claim was denied ; (para. 3) that the machine referred to was not a dangerous part of the machinery at the defendants' factory, and was not a dangerous part of machinery within the said Act of 1901, s. 10 ; or alternatively that the machine was securely fenced ; or alternatively that it was in such position or of such construction as to be equally safe to every person employed or working in the factory as if it were securely fenced; (para. 4) that alternatively the dangerous parts of the machinery, if any, were at the material time necessarily exposed for the purpose of cleaning or lubricating and the defendants would rely upon s. 10, sub-s. 1 (*d*) of the Act of 1901; (para. 6) that if the machine or any part of it was dangerous the plaintiff was familiar with the machine and knew and appreciated the risks and dangers and voluntarily consented to accept and encounter them; (para. 7) that further or in the alternative the alleged injury to the plaintiff was not caused by any personal negligence or wilful act of the defendants or of any person for whose act or default the defendants were responsible, and the defendants would rely upon the Workmen's Compensation Act, 1925, s. 29, sub-s. 1; (para. 8) that the defendants denied that they were guilty of the alleged or any breach of statutory duty, and that they were negligent as alleged or at all; and that if the plaintiff sustained the alleged or any injury the same was not caused by any breach of statutory duty or negligence on the defendants' part; (para. 10) that alternatively the alleged injury was caused solely by the plaintiff's own negligence in that he was cleaning or attempting to clean at an improper part of the machine, and/or was improperly and incautiously endeavouring to retrieve a piece of material from the rollers of the machine when he knew or should have known that it was dangerous so to do, and/or was not paying due and proper attention to his work, and/or was not taking reasonable care to prevent his left hand coming into contact with the rollers on the machine; (para. 11) that alternatively and in the circumstances the plaintiff was guilty of contributory negligence; and (para. 12) that the defendants admitted their liability to pay the plaintiff compensation under the Workmen's Compensation Act, 1925, and would submit to an award therefor.

In July, 1933, the action was tried at Monmouth Assizes. The plaintiff stated in evidence that he cleaned the front upper roller from under the copper bar because by cleaning it in that way he could see better what he was doing and could exert more pressure upon the roller; and that he had received no instructions from or on behalf of the defendants not to clean in that way. On behalf of the defendants evidence was given by Mr. Huxley, the manager of the mill, Mr. Lewis, the foreman of the plant, Mr. Ford, the foreman of the machine in question, and Messrs. Edwards, Rule and Prichard, three of the workmen using the machine in question, and these witnesses stated that the upper rollers could be properly cleaned from above, that there was no necessity to clean the front roller from under the copper bar, that no workman had been seen or known by any of these witnesses to clean in that way, and that it was very dangerous to do so. The evidence is further dealt with below in the judgments delivered by Lawrence J. and in the Court of Appeal.

Hon. Sir Reginald Coventry K.C. and *A. W. Cockburn* for the plaintiff.

Micklethwait K.C. and *A. A. Warren* for the defendants.

1933. July 14. LAWRENCE J.: The plaintiff brings this action for damages sustained to his left hand in an accident which occurred on February 27, 1933, whilst he was engaged in cleaning a sheet roller leveller machine belonging to the defendant company. The action is founded on s. 10 of the Factory and Workshop Act, 1901, the plaintiff asserting and the defendant company denying that the machine was dangerous, that it was not securely fenced, and that the injury to his hand was caused by the lack of a secure fence within the meaning of the Act. Counsel for the plaintiff also contended that contributory negligence was no answer to the action, and counsel for the defendants contended that there is no obligation on an employer to fence during cleaning and that as the accident happened during the cleaning of the machine, the plaintiff could not succeed.

The plaintiff had been in the employment of the defendant company for fourteen years and had been employed on the machine in question since its installation in November or December, 1931. A model, photographs and a drawing of this machine were put in evidence. When first installed it had no fence in front of the place where the first top and bottom rollers bite, but partly in order to satisfy the inspector of factories, Mr. W. C. Poore, and partly because Mr. Dobie, the defendant company's engineer, thought it advisable, a bar, referred to at the trial as the copper bar, was inserted across the front of the machine in front of, and slightly lower than, the first top roller. The inspector of factories did not consider this a secure fence, and so wrote to the defendants on April 27, 1932, enclosing a sketch of a suggested fence, which he considered a secure fence, but which had to be removed for cleaning. The defendant company's manager, Mr. Huxley, after considering Mr. Poore's sketch, decided not to adopt it, and at the time of the accident the copper bar was the only fence installed. Evidence was called on behalf of the plaintiff to prove that complaints were made by trade union representatives, both before and after the installation of the copper bar, but I find that no complaint was made by them, or by any one else, except Mr. Poore, after the installation of the copper bar. At the time of the accident the plaintiff had been cleaning the top rollers with cotton waste from the front for some minutes, the foreman, Mr. Ford, and another workman, meanwhile cleaning the top rollers from the back. The plaintiff's account of what he was doing at the time of the accident was that he had been holding the black bar at the top of the machine with his right hand, and that in order partly to see better, and partly to exert more pressure on the roller, he had put his left hand up under the copper bar with the palm against the first top roller, and that then somehow his hand was drawn into the bite. No witness, except for the plaintiff, was called who either had cleaned in this way or seen any one else do so, and the witnesses for the defendants said that it was contrary to instructions, which were that the rollers were to be cleaned from over the black bar at the top, where there was no danger, because as the rollers were revolving in the same direction, each was going upwards whilst the next was going downwards at the nearest point. It is important to observe that the machine was only 3ft. 0½ in. to the top black bar from the ground, so that there was no difficulty in exerting pressure on the first top roller from over the black bar. Mr. Ford, the foreman, who was cleaning at the time of the accident at the other end of the machine, a few feet away, said that he saw the plaintiff cleaning in the proper way over the black bar with both hands just before the accident, and that the next thing he noticed was the plaintiff's right hand on the black bar, his left hand being out of sight, and that at that moment he saw from the plaintiff's face that the accident had happened. I do not think Mr. Ford's evidence necessarily is inconsistent with the plaintiff's evidence that at the time of the accident he was cleaning in the way he described, since Mr. Ford may have looked elsewhere just before and at the beginning of the accident and only have looked again at the plaintiff just after the accident had happened. I am not prepared to reject the evidence of the plaintiff, which he gave in cross-examination, and repeated on being re-called, and, indeed, I was not invited to do so by the plaintiff's counsel.

The first question is whether the machine is dangerous within the meaning of s. 10 of the Factory and Workshop Act, 1901, and I find that it was. The evidence of Mr. Poore and of Mr. Dobie, coupled with the fact that the defendants had actually fenced it convinces me that danger was reasonably to be anticipated in the ordinary course of human affairs if the machine were not fenced: see *Hindle* v. *Birtwistle*. (1)

The next question is whether it was securely fenced by the installation of the copper bar. This is a question of considerable difficulty. A number of witnesses were called who said it was important that the men working the machine should see the bite in order that they might be able to get the sheets in straight, and that any V-shaped or slot-shaped feed fence would prevent them seeing, and it was contended with much force that the only design suggested by the inspector of factories would have had to be removed for cleaning and that it was, therefore, impossible to attribute an accident during cleaning to the lack of a secure fence. It was not, however,

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(1) [1897] 1 Q. B. 192, 195.

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explained to the inspector at the time that the machine would be cleaned in motion, and, I do not think, therefore, that his suggested fence can be relied upon by the defendants, as being all that could be demanded of them. I am satisfied that there were V-shaped fences which might have been adopted and which would have been more secure than the copper bar and that in all the circumstances the copper bar was not a secure fence. I cannot accede to Mr. Micklethwaite's argument, based in part upon the case of *Coe* v. *Platt* (1), that there is no statutory obligation upon an employer to maintain a secure fence during cleaning in cases where it is not necessary to expose the machinery during cleaning. The case of *Coe* v. *Platt* (1) was decided upon a different statute, which provided that the fence should not be removed while the parts required to be fenced were in motion for any manufacturing process. The words of sub-s. (*d*) of s. 10 of the Act of 1901 contain no such limitation, and it seems to me clearly to imply that where it is not necessary to expose the machinery during cleaning it must not be exposed, that is to say, the fence must be maintained.

As the case of *Rudd* v. *Elder Dempster & Co.* (2) appeared to have been overruled on the point by the House of Lords in *M'Mullan* v. *Lochgelly Iron and Coal Co.* (3), the question whether the accident is barred by s. 29 of the Workmen's Compensation Act, 1925, was not argued before me, but I was asked to find as a fact whether there was personal negligence or wilful act of the company in the matter of the fence. I am of opinion that there was. Mr. Huxley, the manager of this department of the company's works, was in sole charge of the machine, and it was his decision as chief executive officer of the company not to erect the fence suggested by the inspector of factories, or any other fence than the copper bar. His decision was in my opinion the wilful act of the company.

The next question is whether the plaintiff was guilty of contributory negligence and whether that defence is open to the defendant company. In my opinion the defence is open.

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(1) (1851) 6 Ex. 752.

(2) [1933] 1 K. B. 566.

(3) [1934] A. C. 1; 1933, S. C. 235.

I am bound by the case of *Caswell* v. *Worth* (1) which decided the point, and I agree with the observations of Vaughan Williams L.J., in *Groves* v. *Lord Wimborne* (2), on this subject, nor do I think that A. L. Smith L.J. was dealing with the point in his observations about common employment (3). There is, so far as I know, no provision of the law which makes the law of damages different in a case founded upon the breach of a statutory duty from that in a case founded upon the breach of a common law duty. My attention has been called to an Australian case: *Bourke* v. *Butterfield & Lewis, Ld.* (4), in which it was held by the High Court of Australia that in an action at common law for a breach of the statutory duty to fence machinery, contributory negligence is not a defence. That case appears to me to be inconsistent with the following English cases, and I therefore do not follow it: see *Clarke* v. *Holmes* (5), *Britton* v. *Great Western Cotton Co.* (6), *Caswell* v. *Worth* (1), *Groves* v. *Lord Wimborne* (7), *Blenkinsop* v. *Ogden* (8), and *Higgins* v. *Harrison.* (9) I refer also to Smith on Master and Servant (6th ed.), 213, and the cases there cited. It is to be observed that, though *Caswell* v. *Worth* (1) was cited in the High Court of Australia, it was not referred to in any of the judgments, the learned Judges stating that no case had been cited from the English Courts in which it had been directly decided that contributory negligence afforded a defence where the cause of the injury was the breach of an absolute statutory duty (10). Much of the reasoning of the learned Judges in the High Court of Australia appears to me to ignore the true limits of the doctrine of contributory negligence and to assume that the doctrine demands of a workman in a factory a higher degree of care than an ordinary prudent workman in a factory would show. The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants' breach of duty. I find that he could and that the proximate cause of the accident was his own disobedience of orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided, utterly useless. I was invited to consider how a jury would have regarded the question, but I cannot think I ought to allow any consideration of the sympathy which every one must feel for a good workman who has lost his hand to influence my decision. Such considerations are, I think, adequately provided for by the Workmen's Compensation Act, 1925, under which the plaintiff is entitled to a weekly payment of 30*s*. a week. I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence. In this case, however, the plaintiff was disobeying orders without, so far as I am able to see, any good reason, and in doing so was disregarding the fence which, though, as I hold, not a secure fence within the statute, had been put there for his protection, and would have protected him had he obeyed his instructions.

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(1) 5 El. & Bl. 849.
(2) [1898] 2 Q. B. 402, 419.
(3) Ibid. 410.
(4) (1926) 38 Commonwealth L. R. 354.
(5) (1862) 7 H. & N. 937.
(6) (1872) L. R. 7 Ex. 130.
(7) [1898] 2 Q. B. 402.
(8) [1898] 1 Q. B. 783.
(9) (1932) 25 B. W. C. C. 113.
(10) See 38 Commonwealth L. R. 354, 375.

For the foregoing reasons, I give judgment for the defendants.

Judgment for defendants.

The plaintiff appealed from this decision. The appeal was heard on January 29, 30, 1934.

Hon. Sir Reginald Coventry K.C. and *A. W. Cockburn* for the plaintiff, appellant. The action was brought by the plaintiff against the defendants for damages for personal injuries resulting from the breach by the defendants of the statutory duty imposed upon them by s. 10 of the Factory and Workshop Act, 1901, in failing to securely fence a dangerous machine which they employed the plaintiff in using. Lawrence J. has held that the machine in question was dangerous and that it was not securely fenced, and the plaintiff is therefore entitled to recover in the action unless (1.) he was in fact guilty of contributory negligence, and (2.) such negligence is in law a defence to an action for breach of a statutory duty.

First, the plaintiff was not guilty of contributory negligence. It is said that he was negligent in cleaning the front top roller of the machine from under the copper bar. There is no evidence to support this statement. The plaintiff was a skilled and careful workman of long experience and he adopted that mode of cleaning deliberately because he regarded it as the most efficient and therefore the best in the interest of the defendants. In cleaning in that way the plaintiff might have been guilty of an error of judgment, but he was not negligent. Lawrence J., however, if he has found that the plaintiff was negligent, found him to have been so not because he acted thoughtlessly or recklessly, but because he failed to comply with instructions alleged to have been given by the defendants as to cleaning. The learned judge was not entitled so to find. The defence as delivered contained no allegation that the plaintiff had disobeyed instructions, and the defendants obtained no leave to amend it by introducing such an allegation. The defendants were not, therefore, entitled to bring evidence of such instructions or of a breach of them by the plaintiff, and the evidence given as to these matters was inadmissible. Even if that evidence was admissible it does not show that the plaintiff disobeyed his instructions. The instructions to which it related were of a general character to clean the upper rollers from above. The plaintiff complied with these instructions, and it does not appear that in proceeding to clean under the copper bar he was disobeying any instructions of the defendants.

Secondly, if the plaintiff was guilty of contributory negligence by disobedience to instructions or otherwise, the defendants cannot avail themselves of that contributory negligence or disobedience as a defence to an action against them for breach of a statutory duty. In several cases judicial statements may no doubt be found to the effect that

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contributory negligence is a valid defence to an action for breach of a statutory duty; but in none of these cases was the statement necessary to the decision of the case, and therefore the statement was only an obiter dictum. Among these statement are that of Vaughan Williams L.J. in *Groves* v. *Lord Wimborne* (1) where the defence relied upon was not contributory negligence but common employment; those of the three Lords Justices in *Dew* v. *United British Steamship Co.* (2), in the report of which it does not appear that the question whether contributory negligence was a defence was an issue or raised in argument; that of Scrutton L.J. in *Higgins* v. *Harrison* (3), and that of the same learned Lord Justice in *Wheeler* v. *New Merton Board Mills, Ld.* (4), in neither of which cases was the defence of contributory negligence relied upon. In *Caswell* v. *Worth* (5), which was an action for breach of statutory duty by the defendants in not fencing dangerous machinery, it was no doubt held that the plaintiff's disobedience to orders was a defence to an action for not fencing machinery; but that case is distinguishable from the present because there the duty was only to fence machinery in motion, and there the machinery was not in motion until the plaintiff in wilful disobedience to orders herself set it in motion.

[SCRUTTON L.J.; In *Senior* v. *Ward* (6) it was held that the representative of a deceased workman could not maintain an action against the employer for breach of a statutory duty where the workman had been guilty of contributory negligence; and Lord Campbell C.J., in delivering the judgment of the Court, expressly stated that the negligence of the deceased workman would have deprived him of any remedy against the defendant for breach of a statutory duty.]

As against these dicta and decisions there are certain authorities which support the contention of the plaintiff. In *Pringle* v. *Grosvenor* (7), where the facts were very similar to those of the present case, and in *Fotheringham* v. *Babcock & Wilcox, Ld.* (1), it was held that contributory negligence and disobedience to orders on the part of a workman was not a defence in proceedings against the employer for breach of statutory duty in failing to fence dangerous plant. In the case of *Bourke* v. *Butterfield & Lewis, Ld.* (2) it was expressly held by the High Court of Australia that contributory negligence of the plaintiff was not a defence to an action for breach of an absolute statutory duty. In an action for breach of a common law duty such as negligence by a defendant the contributory negligence of the plaintiff is not a defence where, notwithstanding such contributory negligence, the defendant by the exercise of ordinary care might have avoided the accident · *Davies* v. *Mann* (3), *Lynch* v. *Nurdin* (4), and *Radley* v. *London & North Western Ry. Co.* (5); or where the defendant by his negligence has put it out of his power to avoid the consequences of the plaintiff's contributory negligence: *Brenner* v. *Toronto Ry. Co.* (6), and *British Columbia Electric Ry. Co.* v. *Loach.* (7) The principles laid down in these last mentioned cases for breach of common law duty are equally applicable to an action for breach of a statutory duty, such as the action now before this Court. Consequently, as the defendants by ordinary care in putting up a reasonably sufficient fence to protect those using the machine might have prevented the accident, and by failing to do so made it impossible to avoid the consequence of the plaintiff's contributory negligence, they are not entitled to rely on that contributory negligence as a defence to the action. To an action for breach of a statutory duty common employment is no defence: *Groves* v. *Lord Wimborne* (8), and by parity of reasoning it should be held that contributory negligence is no defence to such an action. In an action of that description the plaintiff was held to be entitled to succeed even though he was himself a trespasser: *Bird* v.

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(1) [1898] 2 Q. B. 402, 419.
(2) (1928) 139 L. T. 628.
(3) 25 B. W. C. C. 113.
(4) [1933] 2 K. B. 669.
(5) 5 El. & Bl. 849.
(6) 1 El. & El. 385.
(7) (1894) 31 Sc. L. R. 420.

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(1) (1922) 59 Sc. L. R. 497.
(2) 38 Commonwealth L. R. 354.
(3) (1842) 10 M. & W. 546.
(4) (1841) 1 Q. B. 29.
(5) (1876) 1 App. Cas. 754.
(6) (1907) 13 Ont. L. R. 423.
(7) [1916] 1 A. C. 719.
(8) [1898] 2 Q. B. 402.

Holbrook (1), and even more readily should he be held entitled to succeed where he has only been negligent.

Micklethwait K.C. and *A. A. Warren* for the defendants, respondents:

[SCRUTTON L.J. The Court only requires to hear argument on behalf of the defendants on the first of the questions raised—namely, whether there was sufficient evidence of contributory negligence and disobedience to instructions by the plaintiff.]

There was abundant evidence to prove that the plaintiff was guilty of negligence in cleaning the front upper roller from under the copper bar. All the witnesses called by the defendants stated that there was no necessity to clean the front top roller from under the copper bar as the plaintiff cleaned it, that no other workman cleaned it in that way, and that it was dangerous to do so. The same witnesses also stated that the plaintiff in cleaning from under the copper bar was disobeying the instructions of the defendants. Although evidence to this effect was given on some seven occasions it was not made the subject of cross-examination or otherwise questioned on behalf of the plaintiff until almost the last of these occasions, and even then it was not very seriously disputed. The plaintiff therefore cannot now be heard to say that that evidence is inadmissible.

Hon. Sir R. Coventry K.C. in reply:

As the question whether the defendants gave instructions as to cleaning, and, if they did, whether the plaintiff disobeyed them were not issues in the case it was not necessary to cross-examine the defendants' witnesses in regard to these matters.

SCRUTTON L.J.: This is an appeal from a judgment of Lawrence J., in an action tried by him without a jury, in which the plaintiff, a workman, alleges that he has lost one of his hands in a machine which was a dangerous machine and ought by statute to have been fenced but was not sufficiently fenced by the defendant. The learned judge has found in a very careful judgment, after thorough consideration of the evidence, that the machine was a dangerous machine and was not sufficiently fenced, but he has also found that the plaintiff was guilty of contributory negligence conducing to the accident; and on these findings he has come to the conclusion that although there was a breach by the defendants of their statutory duty, yet the plaintiff, having himself caused the accident by his contributory negligence, cannot by the common law recover in the action.

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(1) (1828) 4 Bing. 628.

The questions which have been raised and argued on the appeal are: First, was the judge right in law in treating contributory negligence as a defence to an action for breach of a statutory duty? and, Secondly, was the judge right in his conclusion of fact that there had been contributory negligence on the part of the plaintiff?

As to the question of law, in my opinion this Court is bound by its own decision in *Dew* v. *United British Steamship Co., Ld.* (1), in which all the members of the Court, as I read the judgments, stated that contributory negligence of a plaintiff was a defence to an action for an admitted breach of a statute. The question in that case arose through breach of regulations under the Merchant Shipping Act, 1894, as to the height of the fence that should be put round the hatches of a ship. Owing to the failure of the defendants to comply with these statutory regulations, the plaintiff, a coal trimmer, fell into the hold of a ship belonging to the defendants, but he was found to have been guilty of contributory negligence. I find that in the course of my judgment in that case I said (2): "I think that it is clearly established by authority that contributory negligence, properly defined, if properly proved, prevents the plaintiff from recovering, though there is a continuing statutory breach up to the time of the accident." Greer L.J. said: "It may be that at one time there was some doubt as to whether contributory negligence was a defence in the case of a breach of statutory duty, but by the judgment of Vaughan Williams L.J. in the case of *Groves* v. *Lord Wimborne* (3), following the other cases which have been referred to by my Lord, it was definitely settled, and has been acted on ever since as a rule of law, that in cases of this kind contributory negligence, if established, is a defence to an action based on breach of statutory duty." (1) Sankey L.J., as he then was, at the commencement of his judgment said (2): "In my view, contributory negligence by the plaintiff is a defence even where the defendant has been guilty of a breach of a statutory duty." In my opinion, these statements by the three judges were necessary in order to support the decision of the Court setting aside the judgment under appeal which had given the plaintiff relief in damages. In view of that decision, I do not think it is necessary to go in detail into the earlier authorities. Beginning with *Caswell* v. *Worth* (3) and *Senior* v. *Ward* (4), in which Lord Campbell C.J. delivered the judgment of the Court to the same effect, and passing from these cases to *Groves* v. *Lord Wimborne* (5), one finds that Vaughan Williams L.J. there said: "No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would not be an answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty. It would be an answer for the reason that in fact the damage to the plaintiff would not be caused by the failure of the master to perform the absolute statutory duty, because it would not have happened but for that and something else, namely, the contributory negligence of the plaintiff." (6) Then one comes to the decision of the whole Court of Appeal in *Dew* v. *United British Steamship Co.* (7) from which I have just quoted. If further support for the proposition be necessary, I may observe that apart from the decision in the last mentioned case I had expressed the same view though as obiter in two cases in this Court to which Sir Reginald Coventry has referred—namely, *Rudd* v. *Elder Dempster & Co.* (8), and *Wheeler* v. *New Merton Board*

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(1) 139 L. T. 628.
(2) Ibid. 628, 631.
(3) [1898] 2 Q. B. 402, 415.

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(1) 139 L. T. 628, 634.
(2) Ibid. 635.
(3) 5 El. & Bl. 849.
(4) 1 El. & El. 385.
(5) [1898] 2 Q. B. 402.
(6) Ibid. 419.
(7) 139 L. T. 628.
(8) [1933] 1 K. B. 566.

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Mills, Ld. (1) If that view is wrong, the House of Lords is the only recourse of those who dissent from it. I therefore say as to the first question raised, that if it has been proved that the plaintiff was guilty of contributory negligence, that is an answer to a claim by him based on the breach of a statutory duty by the defendants, and I think that the learned judge has rightly so held.

That brings me to the second question: whether we should interfere with the finding of fact of the learned judge, which may be stated in his own terms. After he had observed that: "No witness, except for the plaintiff, was called who either had cleaned in this way or seen any one else do so, and the witnesses for the defendants said that it was contrary to instructions, which were that the rollers were to be cleaned from over the black bar at the top," the learned judge went on to say: "The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances, could have avoided the result of the defendants' breach of duty. I find that he could and that the proximate cause of the accident was his own disobedience of orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided, utterly useless." I am not going into the facts in detail, as it would serve no useful purpose to do so. I approach the question of fact from this point of view. For some considerable time the learned judge with a model of the machine before him listened to the evidence of witnesses who were explaining, or attempting to explain, by illustrating with their hands and the help of the model, how the accident happened. The learned judge, having seen and heard all those witnesses and their demonstrations, none of whom we have seen or heard, has come to the conclusion that the plaintiff was negligent. As I understand the machine, the upper and lower sets of rollers are revolving in such a way that a person working or cleaning at the back of the machine runs no risk of having his hand pulled into the nip between the rollers because they there tend to throw his hand

(1) [1933] 2 K. B. 669.

out and not to pull it in. If he is cleaning the upper rollers from above the case is slightly different, because while one roller tends to pull his hand in the next tends to throw it out, and therefore it is possible to clean the upper rollers from that position without any serious risk. If he is at the front of the machine he is in a more dangerous situation because when his hand is low down the rollers will tend to pull his hand or any waste which it may be holding into the nip between the rollers. In order to prevent that possibility a copper bar was put across the front of the machine by the principal engineer. How the accident happened, according to the ultimate explanation of the plaintiff, was that, instead of cleaning by keeping his hand on the rollers from the top, in which case he would not have had two rollers tending to pull his hand in, he attempted to clean the front top roller by putting his hand under the copper bar and then up towards the top. The learned judge has found that to do that was negligent. I have not seen the various explanations which were given by the witnesses with their own hands, but, as far as I can judge from the scale model, it was obviously extremely risky for any one to put his hand under the copper bar and try to get it up to the top of the roller. It was perfectly easy and not risky to clean the seven upper rollers by working over the black bar and putting one's hand on to the top of the rollers, and there was no adequate reason, so far as I can see, why any one should try to clean the front roller by putting his hand under the copper bar, when every part of the roller would come under his hand if he kept it at the top. I should myself, I think, have come to the same conclusion as the learned judge; but, however that may be, I do not feel able to disturb the finding at which he has arrived with more advantages of evidence than I have before me.

It is said, however, on behalf of the plaintiff, that the learned judge has made this mistake that, though breach of instructions was not alleged in the pleadings, yet he has found the plaintiff guilty of negligence on that ground. It is true that in the pleadings, at a time when, it is obvious, nobody had a very clear idea as to how the plaintiff's hand got into the place where it was injured, disobedience to orders or instructions was not alleged. If when the breach of instructions was first mentioned Sir Reginald Coventry had challenged the introduction of the evidence regarding it on the ground that it was not included in the pleadings, it may or it may not be that the learned judge would have allowed an amendment, but Sir Reginald did not challenge the introduction of this point about the instructions. On the contrary, it first appeared in his own cross-examination of one of the defendants' witnesses. It then appeared on seven subsequent occasions, which have been referred to by counsel on both sides, the last occasion being when, in the cross-examination of Edwards, a workman, the first question asked by Sir Reginald was " Were any definite instructions given you as to how you were to clean it ? " and the answer was " General instructions to clean it from the top, putting our hands on the top, either with sandpaper or waste." That answer is merely slightly more definite than the six previous occasions on which the witnesses had given evidence about instructions which were broken by the action of the plaintiff. On none of these occasions was there any challenge, or any more definite cross-examination by Sir Reginald Coventry.

Holding as I do that there was evidence on which the learned judge could find that there was contributory negligence on the part of the plaintiff, and not therefore being able to interfere with his decision to that effect, I am still less able to interfere with it when he adds that the act which he has found to be negligent was also in breach of definite instructions. For these reasons, I think the learned judge came to the right conclusion when he declined to give the verdict for the plaintiff on the ground that the damage of which the plaintiff complained was substantially caused by his own contributory negligence and breach of instructions.

In my opinion, therefore, this appeal should be dismissed with costs.

MAUGHAM L.J. This is an appeal by the plaintiff from a

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judgment of Lawrence J. who was in his favour on the point that the defendants had committed a breach of statutory duty, but decided that the defence of contributory negligence was one which availed the defendants. The claim was for damages in respect of an accident to the plaintiff while he was cleaning a sheet roller leveller machine belonging to the defendants. The action was founded on the Factory and Workshop Act, 1901, s. 10, by which the defendants were under an obligation to guard the machine in question as being a dangerous machine. The learned judge decided that the machine was dangerous although at the time when the accident occurred it was merely being cleaned and was not being used for the purpose of manufacture, and that decision was no doubt correct in view of the important fact that the practice in the defendants' factory was to clean the machine while it was in motion. It followed that according to well known authorities, the plaintiff was entitled in a common law action for negligence to recover damages, unless the defendants could make good their defence of contributory negligence.

The first question is, whether the defence of contributory negligence is available in an action founded upon breach of a statutory duty. This Court, I think, is bound to answer that question in the affirmative. For many years past there has been a consistent stream of authority in favour of the affirmative view. My Lord has mentioned the cases of *Senior* v. *Ward* (1) and *Caswell* v. *Worth* (2) which have now the merit of antiquity. In 1898 the case of *Groves* v. *Lord Wimborne* (3) came before this Court, and Vaughan Williams L.J., in a judgment that has often been cited, took the same view. The question then came before this Court, in a case in which, in my opinion, it was necessary to determine it—the case, namely, of *Dew* v. *United British Steamship Company, Ld.* (4); and there all three of the Lords Justices held that the defence of contributory negligence was available even though the plaintiff's action was founded on breach of a statutory duty. In two subsequent cases that have come before this Court, namely, *Rudd* v. *Elder*

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(1) 1 El. & El. 385.
(2) 5 El. & Bl. 849.
(3) [1898] 2 Q. B. 402.
(4) 139 L. T. 628.

Dempster & Co. (1) and *Wheeler* v. *New Merton Board Mills, Ld.* (2), the members of the Court expressed the same view. Accordingly, it would be quite impossible for the Court, even if it took the view, which I for my part do not take, that the decision in *Dew's Case* (3) was wrong, to interfere with that decision.

The second question is, what is the proper matter to be considered by the Court, or what is the proper question to be answered by the jury, in a case where the defendant is relying on a plea of contributory negligence. I want to say a few words about this question, because at first sight there is no doubt that the numerous cases dealing with it which Sir Reginald Coventry has cited are at least difficult to reconcile with each other, and there have been a good many suggestions from time to time as to the form of the question which should be put to the jury, and as to the real matter that has to be determined, when such a defence is raised. In particular, I must admit that the decision of the Privy Council in the case of *British Columbia Electric Ry. Co* v. *Loach* (4), and some of the observations made by the great lawyer who delivered the judgment in that case, are not at first sight easy to reconcile with several of the other decisions of the Courts. It is, however, to be observed that that case was one in which there was what may be described as the time factor. The problem with which the jury were called upon to deal arose after there had been an initial breach of duty or act of negligence by the railway company, followed by an act of negligence by the deceased and the person who was driving in a wagon across the track of the railway, and then a subsequent interval of time during which it was possible for the driver of the engine to have avoided the accident if the brakes had been in proper condition. I would observe that that is the line of distinction which in my opinion the House of Lords adopted in the recent and well known motor case of *Swadling* v. *Cooper* (5), where there had been a collision at cross-roads between a motor cycle and a motor car. There was a very elaborate consideration or presentation of all the relevant authorities in the argument, and there was a reserved judgment in which Lord Hailsham made a speech which was accepted by the other members of the tribunal including Lord Dunedin and Lord Buckmaster. In the course of his speech Lord Hailsham, after considering the cases of *Butterfield* v. *Forrester* (1) and *Davies* v. *Mann* (2), observed: "In both these cases there was a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which was the proximate cause of the injury; and the crucial question, upon which liability depended, was whether either party could by the exercise of reasonable care have avoided the consequences of the other's negligence; if he could, then that party is legally responsible for the accident." (3), and now comes the passage which I wish to insist on: "But there are other cases in which the negligence of the parties is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, and in which both have contributed to the accident." (3) The House of Lords there held that the case before them was one of the second class inasmuch as there was no time during which the defendant could possibly have avoided the accident after the car and the cycle were visible to each other. Then came the question whether the learned trial judge had properly directed the jury and had properly asked them to decide the relevant question. The speech goes on: "The crucial question was that stated by the learned judge in his concluding sentence: 'Whose negligence was it that substantially caused the injury?'" (4) I can imagine that people can be found who would criticise that form of question on the ground that the word "substantially" might occasion doubt in the minds of the jury; but it seems to me, with great respect, that that was a reasonable question to ask, and the House of Lords approved its having been put by Humphreys J. in the case before them, being one in which the precise problem that arises where the interval of time comes in with the possibility of the accident being prevented, did not enter. I ask myself, finally, whether here the learned judge has properly directed himself in accordance with that view and appreciated what contributory negligence really means, and whether he has rightly answered the question as to its existence and effect in this case in favour of the defendants. My Lord has already read one or two passages from the judgment of the learned judge. I think that the passage where he says: "The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances would have avoided the result of the defendants' breach of duty? I find that he could and that the proximate cause of the accident was his own disobedience to orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided, utterly useless," is at least as favourable to the plaintiff as the decision in the House of Lords, to which I have drawn attention, requires, in the circumstances of this case. I do not myself attribute very much importance to the question on the form of the pleadings which my Lord has referred to. It seems to me that in such a case as this it was quite open to the defendants to prove the general instructions to clean the machine from the top. The fact would bear upon the question whether the plaintiff substantially contributed to the accident. After having seen the witnesses, the learned judge has answered the question as I have mentioned, and I can see no sufficient reason for interfering with his decision.

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(1) [1933] 1 K. B. 566.

(2) [1933] 2 K. B. 669.

(3) 139 L. T. 628.

(4) [1916] 1 A. C. 719.

(5) [1931] A. C. 1.

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(1) (1809) 11 East, 60.

(3) 10 M. & W. 546.

(3) [1931] A. C. 1, 10.

(4) Ibid. 11.

On these grounds I agree to the proposed judgment

TALBOT J.: I have come to the same conclusion.

The first question to which importance was given in the course of the argument was whether contributory negligence is a good defence to an action for damages based upon the breach of a statutory requirement, which, it is admitted, this action is. On that point I agree entirely with the judgments which have been already delivered. It seems to me impossible in this Court to contend with success that contributory negligence is not such a defence. The question was once undoubtedly capable of argument, and to-day in any tribunal having authority to review the cases which have been cited, it is open to argue it, and to call attention to the difficulty of reconciling in principle the doctrine accepted with regard to contributory negligence, and that accepted with regard to common employment and perhaps other defences. I certainly agree that the matter, so far as this Court goes, is concluded by authority.

I should like to say a word regarding a point which was taken by the learned counsel for the appellant when he was discussing the case of *Dew* v. *United British Steamship Co.* (1) There is no question that the three learned judges who decided that case stated in emphatic and unambiguous language that contributory negligence is a good defence to an action of this class; but it is said that that expression of opinion can be disregarded in this Court because it was not necessary for the purpose of deciding that case that that opinion should be expressed. I do not agree, any more than the other members of this Court, that that expression of opinion was in fact unnecessary, and it appears to me that it is not legitimate to say that it should be disregarded. It is of course perfectly familiar doctrine that obiter dicta, though they may have great weight as such, are not conclusive authority. Obiter dicta in this context means what the words literally signify—namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision. It seems to me, however, to be an abuse of language to describe as obiter dicta the deliberate pronouncements in *Dew's* case (1), which were all made expressly as reasons for the decision to which the Court there came, and even if I did not assent to them, I should certainly regard these pronouncements as authoritative.

The question that troubled me somewhat during the argument was whether the learned judge, in coming to the conclusion that the plaintiff had been guilty of contributory negligence, came to that conclusion solely on the ground that he had infringed certain instructions which he had received from those in authority as to the way of conducting the operation of cleaning these machines in the course of which he was injured. If that was the ground of his decision, that is to say, if he would not have found contributory negligence unless he had been satisfied that the plaintiff did in fact infringe some instructions of that sort, then it would have been difficult to support his decision if it turned out that there was no satisfactory evidence that such instructions had been given; and by "given" I of course mean given in such a way that he must be taken to have received them or known of them. I am still not satisfied, and, indeed, I doubt whether the judge would have found against the plaintiff on the issue of contributory negligence, if it had not been for his opinion that he did disobey orders or instructions. I may say that I do not think it is now open to the plaintiff to say that the point that he disobeyed instructions should not have been raised because it was not pleaded, for it seems to me that he is estopped from saying so by the fact that no objection to that point being raised was taken on his behalf. I think that the learned judge considered the matter of the plaintiff's disobedience to instructions and orders designed for his protection, not as a substantive point in itself, but merely as evidence that he had not taken proper care over his work, and I certainly am not prepared to say that he was not justified in so regarding it. It appears fairly clear from his judgment that he did consider that disobedience to orders as a necessary ingredient in the finding of contributary negligence. After saying that the question was whether the plaintiff by the exercise of ordinary care could have avoided the result of the defendants' breach of duty, he went on to say: "I find that he could, and that the proximate cause of the accident was his own disobedience of orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided, utterly useless." A little further on after expressing what I may take the liberty of saying was his very wise caution with regard to contributory negligence of factory workmen—namely, that "it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence," he follows at once with this: "In this case, however, the plaintiff was disobeying orders without, so far as I am able to see, any good reason, and in doing so was disregarding the fence which, though, as I hold, not a secure fence within the statute, had been put there for his protection, and would have protected him had he obeyed his instructions." Putting these passages together, I think the only just way of reading them is to treat them as meaning that he regarded the plaintiff's disobedience to orders as essential to the conclusion that he had been guilty of contributory negligence.

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(1) 139 L. T. 628.

As I have said, what caused me some doubt was whether there was satisfactory evidence that instructions had been given that in cleaning these machines the hands of the workmen doing the work were to be kept above the rollers and not inserted below this copper bar. Without saying whether it might not have been better if the matter had been more fully tested, I think that there was ample evidence on behalf of the defendants upon which the judge could find that such instructions were given. There are several passages in the evidence of the defendants' witnesses bearing upon this matter. I think it will be sufficient to refer to one of the last of these which is perhaps the most important because it would seem to have been the first in which the statement of the witness was made the subject of cross-examination by counsel for the plaintiff. The witness whom counsel selected for his question—namely, Mr. Thomas Edwards, was one of great importance in this regard. He was a fellow workman of the plaintiff, who would naturally be inclined, so far as he honestly could, not to injure the plaintiff's case. He was moreover in a position to say whether these instructions were so given as to reach the intelligence of the workmen who were intended to be influenced by them. This witness was asked in cross-examination by counsel for the plaintiff as to the cleaning of the machine: "Were any definite instructions given you as to how you were to clean it?" and his answer was: "General instructions to clean it from the top, putting our hands on the top, either with sandpaper or waste." I think that anybody reading the note of the evidence must be struck by the fact that counsel did not attempt to pursue the matter further but simply left it where it was. The learned judge may well have inferred that counsel thought it imprudent to follow the matter further. As I have said, I think there was ample evidence that instructions of this sort were given, and, being given, that they were disobeyed by the plaintiff.

It appears to me that the learned judge came to a perfectly correct decision on the law applicable to the case, and that upon the question of fact it is quite impossible for us to interfere with his finding. I agree therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff, appellant: *Pattinson & Brewer*, for *Lyndon Moore & Co., Newport, Mon.*

Solicitors for defendants, respondents: *Bell, Brodrick & Gray*, for *Arthur J. Prosser, Cardiff.*

J. R.

Explained and distinguished. LONG EATON CO-OP. SOC., LTD. *v.* SMITH. [1949] 1 All E.R. 633.

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WILLIAMS *v.* SMITH.

Employer and Workman—Worker in Agriculture—Wages—Benefits or advantages reckoned as wages in lieu of cash—Board and lodging—Value fixed by Statutory Order—Separate agreement with employer to pay more—Agricultural Wages (Regulation) Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 37), *s.* 7, *sub-ss.* 1, 10, 11 ; *s.* 8, *sub-s.* 1 (*a*).

A worker in agriculture under his contract of service received his proper statutory wages in full. Under a separate agreement with his employer he paid back to his employer 1*l.* each week for board and lodging with him, 15*s.* being the maximum amount fixed by statutory order under s. 8, sub-s. 1 (*a*), of the Agricultural Wages (Regulation) Act, 1924, as the value of that benefit or advantage which could be reckoned as payment of wages instead of payment thereof in cash. The worker was free to lodge elsewhere, and the employer would have preferred him to do so :—

Held, that as the employer had allowed the worker to board and lodge with him he might not receive from him more than 15*s.* per week in respect thereof, although in form the contract to pay more was distinct from the contract of service.

CASE stated by Lincolnshire justices.

At a court of summary jurisdiction sitting at Brigg in the county of Lincolnshire an information was preferred by the appellant Archibald Carr Williams against the respondent Joseph Smith, for that he on May 13, 1933, at Waddingham Cliff Farm, Waddingham, Kirton-Lindsey, in the said county, being a person who employed Percy Birch, a worker in agriculture, nineteen years of age, did not pay wages to the said Percy Birch (as a waggoner) at a rate not less than the minimum rate as fixed under the provisions of the Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37), and Orders made thereunder. The information was heard on November 7, 1933, when the justices dismissed it, but stated this case.

Upon the hearing of the information the following facts were proved or admitted. By an order dated February 20, 1933, the Agricultural Wages Board duly fixed the minimum rate of wages for male workers (waggoners) employed in agriculture in an area comprising the respondent's farm at not less than 1*l*. 11*s*. per week. By an order dated February 4, 1926, the Kesteven and Lindsey (the said area) agricultural wages committee defined the benefits or advantages which might be reckoned as payment of wages in lieu of payment in cash for the purpose of the application of the minimum rate of wages for the said area, and the values at which the said benefits or advantages were to be reckoned. It provided that board and lodging was to be one of such benefits or advantages, and that its value in the case of workers of eighteen years of age and over was 15*s*. per week.

In May, 1932, the respondent entered into a parol agreement to employ the said Birch as a waggoner at a wage of 1*l*. 11*s*. per week. At the time the contract was made the respondent said to Birch: "If you want to live with me it will be 1*l*. a week." He told Birch that he could either live with him or elsewhere, but that in the former event he would have to pay the respondent's wife 1*l*. per week. Birch said he would do so, as he could not get lodging accommodation elsewhere for less, although there was other lodging accommodation in the village available and convenient for his work. Both the respondent and his wife would have preferred that Birch should lodge elsewhere, but he lodged and boarded at the farm throughout his employment by the respondent. At the end of each week and especially on May 13, 1933, aforesaid, the respondent handed Birch the full wage, 1*l*. 11*s*. (less insurance), and Birch handed 1*l*. thereout to the respondent's wife or daughter, in payment for his board and lodging.

The question for the opinion of the Court was whether upon these facts the justices had come to a correct decision.

Sir Thomas Inskip A.-G. and *Hubert Hull* for the appellant. The justices were wrong. The real substance and effect of the arrangement between Birch and the respondent was that the former was to receive his full wages less 1*l*. for board and lodging, being 5*s*. more than the sum allowed by the Act and Orders to be reckoned instead of payment in cash. This may have been, in form, a separate contract, but the Act cannot be evaded so easily. The Legislature intended to protect the worker against himself. In *Hayes* v. *Curtis* (1), where the value of a pint of milk daily was deducted from the wages, milk in that case not being one of the things the value of which could be reckoned in lieu of wages in cash, it was held that the Act had been infringed although the special case set out that " in accordance with the agreement made between [the workman] and [the employer] the said milk was purchased from [the employer], the price thereof being deducted from the weekly cash wages paid to [the workman]."

[*Hughes* v. *Davies* (2) was also referred to.]

Monckton K.C. and *Graham-Dixon* for the respondent. What is prohibited is failure to pay proper wages, and in fact full wages were paid to this waggoner. There is no obligation on the employer to provide board and lodging. Therefore he is in the same position as any one else providing board and lodging. There is nothing in the Act or Orders to prevent a workman living with his employer, and he may choose him in preference to others letting lodgings. He may spend his wages as he likes. To be illegal the agreement to board and lodge must be part of the contract of employment, and this was a separate agreement which Birch was free to make with his employer or any one else. This must be treated as a spending of the wages, not as a reception of wages in the form of board and lodging.

[LORD HEWART C.J. Are you not saying in effect that master and man may agree to ignore the Act and make their own arrangement ?]

No. The special case finds that the respondent did not want Birch to lodge with him. No doubt there might be colourable cases, but no mala fides is suggested here.

Sir T. Inskip A.-G. in reply. The fact that in form there were two agreements does not affect the substance of the transaction.

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(1) (1928) 26 L. G. R. 389.

(2) (1929) 28 L. G. R. 11.

LORD HEWART C.J. In my opinion this appeal ought to be allowed. I agree, if I may say so, entirely with the argument which has been made by the learned Attorney-General, attractive as Mr. Monckton's argument is upon a first view. No doubt it does seem hard that a man shall not be allowed to spend his wages as he pleases, but when one looks at this Act and the object of this Act I cannot help thinking that within certain limits its very purpose is to prevent what has been called an independent bargain. Sect. 7, sub-s. 10, provides as follows: "Any agreement for the payment of wages in contravention of this Act, or for abstaining to exercise any right of enforcing the payment of wages in accordance with this Act, shall be void," and when one comes to s. 8, sub-s. 1, which is to be read in close connection with sub-s. 11 of the preceding section, it is provided that the Minister shall have power "to make regulations for the following purposes—(*a*) for requiring"—the word "requiring" is important—"the wages committees by order to define"—now to define what? Not only "the benefits or advantages . . . . which may be reckoned as payment of wages in lieu of payment in cash," but also, "the value at which they are to be reckoned," and that being so it seems to me to be quite immaterial that in a particular case the employed person is willing to pay more. The Act says that the wages committees may be required by Order to define the value at which certain things are to be reckoned; they are only certain things, and when one looks at the Order which has been made they are what one would naturally expect, milk, potatoes, oil and fuel, board and lodging, and in the case of a man or a youth of the age of the waggoner here, the board and lodging are defined to be of the value of 15*s.* per week of seven days, and however hard it may seem in the particular case, I cannot help thinking that this part of the Act would be reduced to a nullity if notwithstanding the clear words of this section what is called an independent or a collateral bargain could be made between the employer and the employed whereby the value defined by the wages committee was exceeded. At first blush the suggestion that what was done here was done voluntarily is attractive, but if that argument was to prevail it seems to me to follow, as indeed Mr. Monckton in one passage of his ingenious argument appeared to admit, that the only utility of the definition provided for in s. 8, sub-s. 1 (*a*), would be limited to a case where payment was made by an unwilling person. When I look at the form of this transaction and compare it with what seems to be the reality, I think the truth of the matter on the facts found in this case is clearly this, that this man had no alternative but to pay 20*s*. a week for that which was defined in value as being worth 15*s*. a week, and I think that one only gets into confusion by travelling beyond the matters of which the value is defined by the committee into matters over which the committee has no control whatever. It is nothing to the purpose to say that a man may pay what he likes for his boots or his clothes. Where there is a definition of value made by the committee it appears to me that the statute says that that amount is not to be exceeded. Speaking for myself I think it is mere matter of form that the one bargain, "I will employ you at 31*s*. a week," is apparently separate from and independent of the other bargain, "If you come to lodge in my house you shall pay me 1*l*. a week." I think that the effect of this enactment is that the farmer is bound to say: "I cannot prevent you from paying 1*l*. a week to somebody else, but as between you and me or as between employer and employed, since the passing of this Act I am limited to 15*s*., as are you." I think therefore that if effect is to be given to this statute that which was done here, although no doubt done in perfect good faith, was a contravention of its provisions, and that this appeal ought to be allowed and that the case ought to go back to the justices with a direction that the offence which was charged was proved.

AVORY J. I agree. However attractive at first sight the argument of Mr. Monckton is that an agricultural worker who has once been paid the wages fixed under this regulation ought to be allowed to spend his money as he pleases, I have come to the conclusion that the effect of the sections, particularly sub-ss. 10 and 11 of s. 7 and of s. 8 of the Act of 1924, is to prohibit the agricultural worker from spending more than a certain amount upon certain matters which are described as benefits or advantages under the Act, two of those benefits or advantages being board and lodging, and that the effect of the legislation and of the regulations and definitions of the wages committee is that in this case the worker was not permitted to make an agreement for payment of more than 15*s.* a week for his board and lodging with his employer. I agree, therefore, that this case should be remitted to the magistrates to find that the employer is liable.

HUMPHREYS J. I agree. I have felt great difficulty in the course of the argument in this case, but on the whole I have arrived at the same conclusion as the other members of the Court. I think the Attorney-General was right in saying that if the Court once allowed the theory of an independent contract to be established, it would have to put itself in the position which the Legislature by s. 8, sub-s. 1, of this Act has reserved for the wages committee, of deciding not only what benefits or advantages may be reckoned as payment of wages in lieu of payment in cash, but also the value at which they are to be reckoned; in other words that the Court would be doing in the case of benefits or advantages which are defined under the Act that which the Court is required to do in the case of benefits or advantages which are not defined under the Act. I am referring to sub-s. 11 of s. 7 of the Act, under which the Court itself decides what is the value of the benefit or advantage which accrued to the employee in the particular case. I agree with the judgments which have been pronounced.

Appeal allowed.

Solicitor for appellant: *Solicitor to Board of Agriculture and Fisheries.*

Solicitors for respondent: *Ellis & Fairbairn.*

W. L. L. B.

1933
Dec. 19, 20.
1934
Jan. 16, 23.

ELIAS AND OTHERS *v.* PASMORE AND OTHERS.

[1933. E. 635.]

Criminal Law—Police—Arrest on premises of third parties—Right to search suspect—Right to seize documents found on suspect—Right to seize documents found on premises—Right to retain possession of documents—Trespass ab initio.

In order to effect the arrest of H., the defendants, police officers, entered the plaintiffs' premises. While there they seized and carried away documents found on the premises, being (*a*) documents which were afterwards used on the trial of E., (*b*) a document found on H. and used on his trial, and (*c*) documents which did not constitute evidence on these trials. At the conclusion of the trials the documents under (*a*) and (*b*) were not returned; those under (*c*) were returned soon after seizure.

Held, that although the original seizure of the documents was unlawful, it was excused as regards documents under (*a*) and (*b*), it being to the interest of the State that material evidence should be preserved.

Held, further, that the police had a right to search H. on his arrest, and also to seize any documents in his possession which would form material evidence against him or anybody else on a criminal charge. Any property so taken might be retained by the police until the conclusion of proceedings under any such charge.

The police, having lawfully entered the premises to arrest H. did not by reason of the subsequent unlawful seizure of the documents under (*c*) become trespassers ab initio as to the land, but only as to the documents.

ACTION tried by Horridge J. without a jury.

The plaintiffs were the lessees of certain premises, 35 Great Russell Street, which were the headquarters of the National Unemployed Workers movement, and the defendants were Pasmore and Kitchener, two police inspectors, Baron Trenchard, Commissioner of the Metropolitan Police, and the Receiver for the Metropolitan Police District. On October 30, 1932, one Hannington, who was one of the plaintiffs, made a speech in Trafalgar Square in consequence of which a warrant for his arrest was issued. In executing it the defendants Pasmore and Kitchener, two police inspectors, on November 1, 1932, entered the above premises, and, in addition to arresting Hannington, seized a number of documents therein and removed them to Scotland Yard. On the same day a number of these documents was returned and others on November 8, 10 and 18, but the rest, contained in a bundle marked 2 (A), some of which were marked as exhibits and used on the trial of the plaintiff Elias on a charge of inciting Hannington to commit the crime of sedition, were retained by the police. Among them was the copy of a letter signed " P.C." written by a police-constable to a Labour paper, and found on Hannington. Although the trials of Hannington and Elias were concluded none of the documents in bundle 2 (A) had been returned.

The plaintiffs claimed damages for trespass to the premises and the return of the documents in bundle 2(A), and damages for their detention.

Hon. Sir Stafford Cripps K.C., *Pritt K.C.* and *G. R. Mitchison* for the plaintiffs. The police had no right to search these premises and seize documents which had no relevance to the charge against Hannington. No search warrant was granted, nor could it have been granted, the case not being within the purview of any of the statutes which give a right of search. And no such right exists at common law: *Entick* v. *Carrington*. (1) Even where a search warrant had been granted the constable who acted under it could be sued for trespass if he acted in excess of the powers it conferred: *Crozier* v. *Cundey*. (2) When a person is lawfully arrested on suspicion, the person who arrests him is entitled to seize documents in his possession which may reasonably be supposed could be used to prove his guilt: *Dillon* v. *O'Brien*. (3) But the right is limited by these last words. The prosecution of Hannington and Elias has been concluded, so that in any event the police, even assuming a right to seize the documents, have no right to detain them: *Gordon* v. *Chief Commissioner of Metropolitan Police*. (4)

[*Dodson* v. *Pritchard* (5) was also referred to.]

Sir Thomas Inskip A.-G. and *Wilfrid Lewis* for the defendants. When a prisoner is arrested the police are entitled

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(1) (1765) 19 How. S. T. 1029.

(2) (1827) 6 B. & C. 232.

(3) (1887) 20 L. R. Ir. 300, 316.

(4) [1910] 2 K. B. 1080.

(5) (1925) Unreported. In Court of Passage, Liverpool, March 10—In Court of Appeal, July 14.

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to search him—see the observations of Lord Campbell in the footnote to *Bessell* v. *Wilson* (1) and *Carmichael* v. *McCowen.* (2) The right to seize documents recognized in *Dillon* v. *O'Brien* (3), is based on the paramount interest of the State in the seizure and detention of evidence for the trial on a criminal charge of the person arrested or any other person.

All that *Entick* v. *Carrington* (4) decided was that the practice of a Secretary of State issuing a general warrant to bring a person before him for examination and to search his property was contrary to law.

The police are entitled to search for evidence against the man they are arresting, and if, in the course of their search they find documents which may be material on the trial of another person they are entitled to seize them: *Pringle* v. *Bremner and Stirling* (5). *Crozier* v. *Cundey* (6) shows that a police constable, under a warrant to search for specific goods, may seize goods not named therein if likely to furnish evidence on the charge. Apart from authority, it would be ridiculous if the police had to reject evidence against a suspected criminal merely because they happened to find it while arresting somebody else.

[*Merrick* v. *Bartlett* (7) and Halsbury's Laws of England (2nd ed.) vol. 9, p. 101, were also referred to.]

This right to seize goods is not confined to goods on the person: *Tyler and Witt* v. *London & South Western Railway* (8) and such goods are lawfully in custodia legis (8), and money taken in such circumstances does not render the police debtors to the accused—*Bice* v. *Jarvis* (9), and the police cannot be sued unless they transfer the property to a third party: *Winter* v. *Bancks.* (10) In any case the documents in the present case, being seditious documents, cannot be the subject-matter of property.

The police, in going to arrest Hannington, were lawfully on the premises, and were not trespassers, and they did not become trespassers ab initio within the *Six Carpenters' Case* (1) by reason of the fact that they afterwards became trespassers as to some of the documents: *Harvey* v. *Pocock* (2) and *Canadian Pacific Wine Co.* v. *Tuley* (3).

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(1) (1853) 20 L. T. (O. S.) 233.

(2) (1903) 8 Newfoundland L. R. 597.

(3) 20 L. R. Ir. 300, 316.

(4) 19 How. S. T. 1029.

(5) (1867) 5 M. (H. L.) 55.

(6) 6 B. & C. 232.

(7) Times Newsp. May 4, 1893.

(8) (1884) Cab. & E. 285.

(9) (1885) 49 J. P. 264.

(10) (1901) 19 Cox C. C. 687.

The goods seized having been produced in court it was right that they should be retained for the purposes of justice until the conclusion of the trial: per Wright J. in *Reg.* v. *Lushington, Ex parte Otto.* (4) When the trial is concluded the goods are still lawfully detained by the police until appropriate proceedings with regard to them are taken under the Police (Property) Act, 1897 (60 & 61 Vic. c. 30).

Pritt K.C. in reply. The doctrine in *Pringle* v. *Bremner and Stirling* (5) that the police may do something wrong, but that if it leads to a conviction for crime it is excused is not the law of England. In *Reg.* v. *Lushington, Ex parte Otto*, Wright J. said (6) " It is undoubted law that it is . . . . the duty of constables to retain for use in Court things which may be evidences of crime "—but he adds the significant words " and which have come into the possession of the constables without wrong on their part." In the American case of *United States* v. *Lefkowitz* (7), *Entick* v. *Carrington* (8) was cited and approved.

[*Leigh* v. *Cole* (9), *Wilkes* v. *Wood* (10) and *Sowell* v. *Champion* (11) were also referred to.]

By reason of the subsequent wrongful seizure of the documents other than those in bundle 2 (A), even though the original entry on the premises was lawful, the defendants became trespassers ab initio.

Cur. adv. vult.

1934. Jan. 23. HORRIDGE J. read the following judgment:—The plaintiffs' claim in this case is for damages for trespass on certain premises situate at 35, Great Russell Street, in the County of London, which were occupied by the National Unemployed Workers movement, and of which premises the plaintiffs Elias, Llewellyn and James were tenants, and for the return of certain documents, and 10*l.* damages for their detention. It was not contended before me that the plaintiffs were not the proper persons to bring the action. As regards the defendant Baron Trenchard, the Attorney-General did not wish in this case to raise the point that he was not responsible for anything done by the defendants Pasmore and Kitchener, and no case was pressed as against the Receiver for the Metropolitan Police District.

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(1) (1610) 8 Coke 146*a*; 1 Smith's L. C. (13th ed.) 134.

(2) (1843) 11 M. & W. 740.

(3) [1921] 2 A. C. 417.

(4) [1894] 1 Q. B. 420, 423.

(5) 5 M. (H. L.) 50.

(6) [1894] 1 Q. B. 423.

(7) (1932) 285 U. S. 452.

(8) 19 How. S. T. 1029.

(9) (1853) 6 Cox C. C. 329.

(10) (1763) 19 How. S. T. 1153, 1167.

(11) (1837) 6 A. & E. 407.

On November 1, 1932, the defendants Pasmore and Kitchener, under the authority of a warrant for the arrest of Hannington, entered upon the said premises, and in addition to arresting Hannington, seized a number of documents and other things which were on the premises and removed them to Scotland Yard. Subsequently on the same day, and on November 8, 10 and 18, all the things which had been removed were returned with the exception of those contained in the bundle marked 2 (A). The plaintiffs claim that they are entitled to damages for trespass to the premises and to all the goods removed, and also claim delivery of the documents contained in the bundle 2 (A) with 10*l.* damages for their detention.

As regards the damages for trespass to the premises, the plaintiffs rely upon the *Six Carpenters' Case* (1), as showing that if there was any illegality subsequent to entry, the entry becomes a trespass ab initio, but I think the cases of *Harvey* v. *Pocock* (2) and *Canadian Pacific Wine Co.* v. *Tuley* (3) show that the defendants were only trespassers ab initio as to the documents and goods that were seized, and they were not liable for any damages in respect of the entry on the premises for the purpose of the lawful arrest of Hannington. I have therefore to consider how far the defendants were justified in seizing and removing the documents and goods which were in fact seized and removed. It was not contended before me that there was any general right of search or seizure, but it was submitted that in certain circumstances there was a right to seize and detain documents; but this contention, if correct, did not in any way justify the seizure and removal of the documents and goods which have already been returned, and I will deal later on in my judgment with the remedy which the plaintiffs have in respect of such seizure and removal.

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(1) 8 Coke 146*a*; 1 Smith's L. C. (13th ed.) 134.

(2) 11 M. & W. 740.

(3) [1921] 2 A. C. 417.

The propositions put forward with regard to the removal of the remaining documents in bundle 2 (A) were: (1.) that there was a right to search the person arrested; (2.) that the ✕ police may take all articles which were in the possession or control of the person arrested and which may be or are material on a charge against him or any other person; (3.) that the police, having lawfully entered, are protected if they take documents which subsequently turn out to be relevant on a charge of a criminal nature against any person whatever; (4.) that the police are entitled to retain property taken until the conclusion of any charge on which the articles are material.

In dealing with these different propositions, I only propose to deal with the authorities which seem to me to be the most relevant to this enquiry, although others have been cited to me. (1.): As to the right to search on arrest. This right seems to be clearly established by the footnote to *Bessell* v. *Wilson* (1) in the report in the *Law Times*, where Lord Campbell clearly lays down that this right exists, but this right does not seem to me to authorize what was done in this case, namely, to seize and take away large quantities of documents and other property found on premises occupied by persons other than the person of whom the arrest was made.

As to the second contention, I think the case of *Dillon* v. *O'Brien* (2) clearly lays down that constables are entitled upon a lawful arrest by them of a person charged to take and detain property found in his possession which will form material evidence on his prosecution for that crime, and I think, for the reasons hereinafter stated with regard to the third contention, that that would include property which would

(1) 20 L. T. (O. S.) 233; 1 E. & B. 489.

(2) 20 L. R. Ir. 300, 316.

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form material evidence on the prosecution of any criminal charge. This, however, would not justify the seizure of the documents in this case with the exception of the letter signed "P.C.", a copy of which was found on Hannington, and which is in the bundle 2 (A).

In support of the third contention, the Attorney-General relied on the case of *Pringle* v. *Bremner and Stirling*. (1) In that case an action was brought at the instance of one Pringle for damages in respect of the illegal search of his house and repositories. The defenders in that case pleaded that a warrant had been obtained to search the pursuer's premises for pieces of wood and a fusee and that in searching the pursuer's house for the articles mentioned in the warrant they discovered papers which seemed to them to throw light on the sending of a threatening letter and to implicate the pursuer therein, and that they thought it their clear duty to take possession of the documents. It is to be observed in that case that the defenders entered only under a warrant to search for the wood and fusee which it was alleged were used in causing the explosion of the bush of a cartwheel near the dining-room window of the manse of Mr. Edgar, but the charge in respect of which the pursuer was arrested and the papers taken was a charge of sending a threatening letter. Lord Chelmsford, in the course of his opinion says (2): "But supposing that in a search which might have been improper originally, there were matters discovered which shewed the complicity of the pursuer in a crime, then I think the officers, I can hardly say would have been justified, but would have been excused by the result of their search. Then again, with regard to the arrest and imprisonment of the pursuer,—as to that it is not alleged that there was any warrant at all; but then, it is said, the constable having discovered matters which, in his judgment, brought home to the pursuer complicity in the alleged crime, he was justified in exercising his discretion upon the subject, and in apprehending the pursuer and lodging him in prison. Again, I say, answering in the same way as I answered with regard to the searching for papers, the result will either justify him or will not justify him; if the papers he seized really proved or gave a fair and reasonable ground to believe that the pursuer was implicated in the grave crime which was charged, then, although the officer might have had no warrant for his apprehension (and he had no warrant upon this occasion), yet the event would justify him and he would protect himself by the circumstances afterwards discovered." Lord Colonsay says (1): "Now, the case being one of excess of authority by reason of having done things which the warrant did not authorise to be done, though the parties were lawfully in the house, and lawfully searching, the question comes to be, what was it that the constable might have been held justified in doing? If the constable is to be held under such circumstances as justified in taking possession of papers which he finds implying complicity in the offence which is under investigation, then I think that the constables here would have a good defence in stating and in proving at the trial that they had taken possession of papers which gave them reasonable ground to suppose that this party was implicated in the offence." He further says (2): "I have been of opinion, and I cannot say that I am entirely shaken in that opinion, that the statements of the pursuer were evasive, and avoided that which was the main point in the case,—the reasonableness or non-reasonableness of the conduct of the constables. However (as I have said), that is a very narrow question of pleading; and as it is held that nothing that is done in this case interferes with the proposition which was contested in the Court below,—that a constable in executing a search warrant for certain articles, and finding other articles that tend to implicate the party, and taking those articles and the party himself also into custody, is only acting in the performance of what may be his duty,—I think there is the less reason to regret that there should be any difference of opinion in regard to this case."

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(1) 5 M. (H. L.) 55. (2) Ibid. 60.

That case seems to me to show that in the opinion of the Lord Chancellor and Lord Colonsay, though the seizure of documents was originally wrongful, if it in fact turned out that the documents seized were documents which might be properly

(1) 5 M. (H. L.) 61. (2) Ibid. 62.

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used in a prosecution against any one, then the seizure would become excused. This, however, is a Scotch case, and must not be taken to have been decided on the law of England, and it becomes necessary therefore to consider whether in principle the same doctrine can be applied to a seizure of documents in England. There was no direct authority cited to me in support of the proposition in English law.

In examining the case of *Dillon* v. *O'Brien* (1) and the judgment of Palles C.B., it seems to me that the principle on which he held that there was a right to detain property in the possession of the person arrested is that the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial, and in dealing with the case of *Entick* v. *Carrington* (2) he says (3): "The question there was as to the legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable and probable cause for believing him to be guilty, nor that a crime had, in fact, been committed by any one, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or any one else."

In the case of *Crozier* v. *Cundey* (4), where a constable having a warrant to search for certain specific goods alleged to have been stolen found and took away these goods and certain others also supposed to have been stolen but which were not mentioned in the warrant and which were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant, it was held that the constable was liable to an action of trespass. Abbott C.J. says (5): "If those others had been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, there

(1) 20 L. R. Ir. 300.

(2) 19 How. S. T. 1029.

(3) 20 L. R. Ir. 318.

(4) 6 B. & C. 232.

(5) Ibid. 233.

might have been reasonable ground for seizing them, although not specified in the warrant." He also said: "I have expressed myself in this manner in order to prevent the supposition, that a constable seizing articles not mentioned in the warrant under which he acts, is necessarily a trespasser." It therefore seems to me that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by any one, and that so far as the documents in this case fall into this category, the seizure of them is excused.

The documents coming within this description were all the documents contained in bundle 2 (A) which were marked as exhibits and which were used at the trial of Elias. It was admitted by counsel for the plaintiffs that these documents were capable of being evidence in the case against Elias, who was convicted of unlawfully soliciting and inciting Emrys Glunf Llewellyn and Walter Hannington to commit the crime of sedition. In my opinion the seizure of these exhibits was justified, because they were capable of being and were used as evidence in this trial. If I am right in the above view, the original seizure of these exhibits, though improper at the time, would therefore be excused.

As to the fourth proposition, that the police are entitled to retain property the taking of which is excused until the conclusion of any charge on which the articles are material, Wright J. says in the case of *Reg.* v. *Lushington. Ex parte Otto* (1): "In this country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidences of crime, and which have come into the possession of the constables without wrong on their part. I think it is also undoubted law that when articles have once been produced in Court by witnesses it is right and necessary for the Court, or the constable in whose charge they are placed (as is generally the case), to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded."

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(1) [1894] 1 Q. B. 420, 423.

In this case, however, both the trials of Hannington and Elias have been concluded, and I think there is no answer now to the claim for their detention after demand or for the 10*l.* claimed as damages for their detention.

The Attorney-General stated that for the purposes of this case only he did not intend to contend that the plaintiffs, because these documents were of a seditious character, could have no property in the exhibits which had been used on the charge against Elias.

As regards the claim for damages for trespass to documents and goods, I have held with regard to the letter signed "P. C.", in bundle 2 (A), and also the exhibits used on the trial of Elias, that they were properly seized. The police in seizing the other documents were not actuated by any improper motives, and there is no evidence that the plaintiffs have sustained in any way any special damage, and I think in respect of this matter the sum of 20*l.* should be awarded.

There will therefore be judgment for the plaintiffs for 20*l.* damages for trespass, an order for the return of the documents comprised in 2 (A), 10*l.* damages for detention of those documents, and the defendants must pay the costs of the action.

Judgment for plaintiffs.

Solicitor for plaintiffs: *W. H. Thompson.*
Solicitor for defendants: *Treasury Solicitor.*

W. L. L. B.

QUEEN ANNE'S BOUNTY *v.* THORNE.

C. A.
1934
March 7, 8, 12.

Ecclesiastical Law—Tithe rentcharge—Arrears—Recovery—Appointment by County Court of officer to distrain—Notice of intention to distrain unnecessary—Tithe Act, 1836 (6 *&* 7 *Will.* 4 *c.* 71), *ss.* 67, 81—*Tithe Act,* 1891 (54 *&* 55 *Vict. c.* 8), *s.* 2—*Tithe Rentcharge Recovery Rules,* 1891, *rr.* 2, 4.

An officer appointed by the County Court under the Tithe Act, 1891, s. 2, to distrain on land occupied by the owner thereof for the sum ordered to be paid in respect of arrears of tithe rentcharge together with costs has conferred on him by s. 2, sub-s. 2, "the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge":—

Held, that the obligation to give ten days' notice of intention to distrain imposed by s. 81 of the Tithe Act, 1836, is not imported into s. 2, sub-s. 2 of the Act of 1891 as part of the power to levy a distress created by s. 81 so as to require the officer appointed to distrain to give that notice before levying a distress.

Decision of the Divisional Court (Swift J. and du Parcq J.) [1934] 1 K. B. 297, reversed on this point.

New College, Oxford (*Warden and Scholars*) v. *Davison* (1933) 49 Times L. R. 579 disapproved on this point.

APPEAL from the Divisional Court. (1)

On October 1, 1931, a sum became due to Queen Anne's Bounty in respect of tithe rentcharge from the defendant, E. J. Thorne, a farmer, as the owner and occupier of Church Farm, Coombe Bissett, Wilts. On April 18, 1932, an application was made to the Salisbury County Court on behalf of Queen Anne's Bounty for an order for recovery of arrears of the rentcharge to be executed by the appointment of an officer to distrain. Notice of the application was given to the defendant, who did not appear to oppose the application, and on May 5, 1932, an order was made for the recovery of 13*l.* 6*s.* 1*d.* in respect of the rentcharge and costs, and an officer appointed to distrain for the sum ordered to be paid, and it was declared that the order should be a sufficient distress warrant. On February 24, 1933, without any previous notice of intention to distrain having been given to the defendant, a bailiff acting under the order entered the farmhouse and seized certain furniture. On the same day notice of the seizure was given to the defendant. On March 2, 1933, the registrar of the county court applied to the judge for leave to sell the goods by tender, and at an adjourned hearing on April 6, 1933, when both parties were heard, an order was made giving leave to do so.

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(1) [1934] 1 K. B. 297.

On appeal, the Divisional Court, while holding that the right to distrain conferred by s. 2, sub-s. 2, of the Tithe Act, 1891, extended to all the goods and chattels on the land, held that when an officer was appointed by the county court under s. 2, sub-s. 2, of the Act of 1891 to distrain upon land occupied by the owner thereof for a sum due in respect of tithe rentcharge and costs, it was essential to the validity of the distress that ten days' notice thereof should be given, as required in regard to the power of distress given by the Tithe Act, 1836. (1)

Queen Anne's Bounty appealed. The appeal was heard on March 7 and 8, and judgment given on March 12, 1934.

(1) The Tithe Act, 1836, s. 81, provides: In case the said rentcharge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rentcharge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years . . . .

The Tithe Act, 1891, s. 2, provides:

(1.) Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rentcharge as defined by this Act shall not be recovered in any other manner.

(2.) Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers . . . .

The only point argued on the appeal was whether ten days' notice of distress was required before the exercise of the power of distress conferred by the Tithe Act, 1891, s. 2, sub-s. 2.

Wilfrid Greene K.C., *W. H. Duckworth* and *A. H. Armstrong* for the appellants. Tithes originally consisted of the tenth part of the yearly increase arising from land and the stock upon it, and had to be paid by the person in possession of the tithable subject: Eagle on Tithes (1836 ed.), pp. 65, 146. There were a number of remedies available before the Tithe Act, 1836, to enforce payment: see Eagle on Tithes (1836 ed.), p. 282. By the Tithe Act, 1836, s. 67, a money payment of the nature of a rentcharge was substituted for tithes, and at the same time all the old remedies disappeared and in lieu thereof the power of distress was given to the owner of the rentcharge by s. 81 of the Act. The right of distress had first been recognized by 7 and 8 Will. 3, c. 6, in the case of small tithe, and that right was extended to tithe generally up to a limit of 10*l.* by 53 Geo. 3, c. 127. Under s. 81 of the Tithe Act, 1836, the power of distress had been given to the owner of the rentcharge, but this was altered by the Tithe Act, 1891. By s. 1, sub-s. 1, the liability for rentcharge was imposed on the owner in place of the occupier, even where there was an agreement to the contrary between the owner and occupier, but in a case where such agreement had been entered into before the passing of the Act the owner was given by s. 1, sub-s. 2, a right of recoupment against the occupier, and by sub-s. 3 the sum was to be recoverable from the occupier "by distress in like manner as is provided by sections 81 and 85" of the Act of 1836, and the enactments amending these sections. By s. 2, sub-s. 1, the owner of tithe rentcharge was given power to apply to the county court when tithe rentcharge had been in arrears for three months, and the court might order that the sum appearing to it to be due together with costs should be recovered in the manner provided by the Act. By sub-s. 2, where the owner was also the occupier of the land, as in this case, the order was to be executed by the appointment by the court of an officer who "shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge." Then s. 2, sub-s. 8, provided that the fees payable on the proceedings under this section were to be those set forth in the schedule and the fees, charges and expenses in or incidental to any distress were to be the same as were payable under the Law of Distress Amendment Act, 1888. By s. 9 of the Act of 1891 "owner" of lands or tithe rentcharge is given the same meaning as in the Act of 1836.

There were obvious reasons why notice should be given before the owner of a tithe rentcharge himself distrained, but the need for this is removed when a distress can only be levied by an officer of the court appointed in proceedings of which by r. 4 of the Tithe Rentcharge Recovery Rules, 1891, ten days' notice must be given to the owner of the land. When that notice has been given the owner can give notice of opposition under r. 8 and the order appointing an officer to distrain, which will only be made in a case where the owner is also the occupier, will only be made after five clear days.

But apart from these considerations, s. 2, sub-s. 2, of the Act of 1891 does not import from s. 81 of the Act of 1836 the obligation to give ten days' notice. This is made clear when the language of this subsection and of s. 1, sub-s. 3, is contrasted. In the latter case the sum to be recouped was to be recoverable "by distress in like manner as is provided by sections 81 and 85" of the Act of 1836, and the obligation to give the ten days' notice was clearly imported. But in s. 2, sub-s. 2, the officer appointed by the court is to have "the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts"; so that it is only the power to levy a distraint which is imported and not therefore the obligation to give ten days' notice: see also s. 6, where wide words were used to import the entire remedy and machinery. It would be an abuse of language to say that the provision for notice in s. 81 of the Act of 1836 is part of the power to distrain. It is a condition precedent to the exercise of the power: compare *Barker* v. *Illingworth* (1), where s. 20 of the Conveyancing Act, 1881, was held to regulate and restrict the power already given by s. 19, and see also Leech on the Tithe Acts, 6th ed., pp. xlvi., xlvii.

Further considerations supporting this view are that under s. 2, sub-s. 2, of the Act of 1891 it is in respect of the sum ordered to be paid that the officer is given power to distrain, and not for arrears of the tithe rentcharge. The sum ordered to be paid differs in amount and in law from the arrears in that it includes costs. The notice to be given under s. 81 of the Act of 1836 is described in s. 29 of the Tithe Act, 1860 (23 & 24 Vict. c. 93), as a notice of intention to distrain on land for arrears of rentcharge. That is not a notice which the officer could give. Further, in the same section of the Act of 1860 provision is made for a fee of 2*s.* 6*d.* in respect of the ten days' notice. No such charge is allowed for in the Schedule to the Act of 1891.

H. J. Wallington K.C., *A. W. Roskill* and *Miss H. M. Cross* for the respondents. It is incorrect to say that arrears of rentcharge are not recoverable by a distress levied under the Act of 1891. Tithe rentcharge is not a personal liability in respect of which an order for payment could be made, but a rent issuing out of land: see s. 67 of the Tithe Act, 1836, and s. 2, sub-s. 9, of the Act of 1891. Although therefore it is necessary under the Act of 1891 to obtain an order under which an officer appointed by the court may distrain, it is not the judgment of the court that is enforceable by distress but an obligation recognized by the order of the court to pay arrears of tithe rentcharge and costs. The notice required by s. 81 of the Act of 1836 is therefore perfectly appropriate to the procedure under s. 2 of the Act of 1891. This view is supported by s. 2, sub-s. 1, which deals with the recovery of arrears of tithe rentcharge, and Form 9 of the Forms scheduled to the Rules: see also s. 10, sub-s. 2, which fixes

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a limit of time for the recovery of arrears of rentcharge, and s. 10, sub-s. 4. Further, the officer appointed is in the position of an agent for the tithe owner and can give the notice on his behalf. Even before the Act of 1891 distress was normally effected by an agent, so that the position remains substantially the same. After 1891 the notice could, it is suggested, be given either by the tithe owner or the officer as his agent. Again, the notice need not be in any special form. It follows from all these considerations that the alleged impracticability of serving the ten days' notice under the new machinery does not exist, and the question whether it is necessary turns purely on the construction of the relevant sections. It is material to observe also that ten days' notice of distress was required by s. 3 of 7 & 8 Will. 3, c. 6, although proceedings were necessary under that Act to discover the amount recoverable by the distress, and the same was true under 53 Geo. 3, c. 127. No weight ought therefore to be given to any argument in regard to construction based on the notice not being of value under the machinery of the Act of 1891. Some reliance was also placed on the absence of any provision for a fee in respect of the notice, but having regard to s. 10, sub-s. 4, of the Act of 1891, s. 29 of the Act of 1860 is still applicable.

On the question of construction reliance has been placed on the difference in the phraseology employed in s. 1, sub-s. 3, and s. 2, sub-s. 2, of the Act of 1891. The intention of s. 1, sub-s. 3, was to give the owner of the land as against the occupier the identical right to distrain conferred by s. 81 of the Act of 1836 on the tithe owner. It is the fact that in s. 2, sub-s. 2, the right to distrain is given not to the owner but to the officer appointed by the court, which accounts for the different language employed. That sub-section confers, however, "the like powers of distraint," and in s. 81 of the Act of 1836 it is impossible to separate the requirement of ten days' notice from the power granted. The grant of the power begins with the words "it shall be lawful" and thereafter the power is set out and includes the words "after having given ten days' notice in writing." The position under ss. 19 and 20 of the Conveyancing Act, 1881, which was considered in *Barker* v. *Illingworth* (1), was very different. There the power was conferred by one section and the conditions of its exercise set out in the other. Here the provision as to notice is embodied in the power and is an essential part of the provision conferring the power. The plaintiffs are not entitled to construe s. 81 as first conferring the power to distrain and then providing that it is not to be exercised without notice. The appeal in this case should therefore be dismissed.

[They also referred to Gilbert on Distress, pp. 4, 27, and to Halsbury's Laws of England, 2nd ed., vol. 10, p. 491.]

Greene K.C. in reply. The provision as to notice in s. 81 of the Tithe Act, 1836, is no part of the power to distrain but a condition precedent to the power's arising. Sect. 2, sub-s. 5, provides that any sum ordered by the court under that section to be recovered should " be payable by a trustee in bankruptcy, sheriff, or officer of a court who is in possession of the lands, in like manner as if it were tithe rentcharge recoverable under the Tithe Acts." This establishes conclusively that what is recovered under s. 2 is not arrears of rentcharge.

[He also referred to *Hutchins* v. *Chambers*. (2)]

Cur. adv. vult.

1934. March 12. LORD HANWORTH M.R. This is an appeal from the decision of the Divisional Court given on October 13 of last year reversing a decision of His Honour Judge Maxwell given on April 6, 1933. The point that arises for the decision of this Court is one, and one only. There were other matters discussed in the other Courts, but the present appeal is confined to the question whether it was necessary in respect of distress proceedings before any distress could be levied to give a notice to Mr. Thorne, who was the owner and occupier of the lands liable to distress.

The matter arises in respect of certain tithe rentcharge

(1) [1908] 2 Ch. 20.

(2) (1758) 1 Burr. 579.

which became due from Mr. Thorne, a farmer, who is the owner and occupier of Church Farm, Coombe Bissett, in the county of Wiltshire. It is important to bear in mind that tithes were payable and issued out of the land, that it was the land which was really liable for the tithes in the sense that tithes were the tenth part of the increase yearly arising and enuring from the profits of the land and of the stock upon the land which ought to pay their due to the owner of the tithes. One of the remedies given for the exaction of tithes was by distress. Originally upon a distress the goods distrained were merely held in pledge, and it was not until 2 & 3 Will. & M., Sess. 1, c. 5, was passed that a power of sale was given in respect of distress levied as between landlord and tenant; but the power of sale was in existence at the time when the Tithe Act, 1836, was passed. At that time difficulties had arisen with regard to tithes and a new system was adopted by which there was to be a commutation of tithes after an examination by Commissioners for that purpose, and a tithe rentcharge made payable by the occupier of the land. This is stated in s. 67 of the Tithe Act, 1836, which provides: "From the first day of January next following the confirmation of every such apportionment the lands of the said parish shall be absolutely discharged from the payment of all tithes, except so far as relates to the liability of any tenant at rack rent dissenting as hereinafter provided; and instead thereof there shall be payable thenceforth to the person in that behalf mentioned in the said apportionment a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley, and oats respectively mentioned therein to be payable instead of the said tithes, in the nature of a rentcharge issuing out of the lands charged therewith; . . . . and such rentcharge may be recovered at the suit of the person entitled thereto, his executors or administrators, by distress and entry as hereinafter mentioned . . . ."

A rentcharge is a liability imposed upon land, but in the deed giving a rentcharge there is always a power of distress and when, instead of tithes a rentcharge was apportioned to be paid, there was given the power of distress stated in the section which I have read, a power for securing payment of the rentcharge which accorded with the nature and quality of the rentcharge itself. The statement in the section which I have read is that "such rentcharge may be recovered at the suit of the person entitled thereto, his executors or administrators, by distress and entry as hereinafter mentioned." In s. 81 it is provided: [His Lordship read the section.] The direction, therefore, in s. 81 is that there is to be ten days' notice, but when ss. 67 and 81 are read together, it appears to me that the ten days' notice is really a condition precedent or ancillary to the powers given under s. 81 to levy a distress, and nothing more.

By s. 29 of the Tithe Act, 1860, it was provided that the owner of the tithe rentcharge could make a charge of half-a-crown for the service of that notice. So matters rested until the Tithe Act, 1891, was passed and by s. 1 a complete change was made, for it was enacted: "Tithe rentcharge as defined by this Act issuing out of any lands shall be payable by the owner of the lands, notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rentcharge by the occupier shall be void." Primary liability, therefore, was imposed upon the owner, as distinguished from the occupier. By sub-s. 2 of s. 1 it was recognized that the liability might have been imposed upon the occupier by a contract made before the Act; but in order not to detract from the definite liability imposed upon the owner, it was provided that even in such a case the occupier was to cease to be bound by the part of his contract making him liable to pay tithe rentcharge, although he was still to be liable to the owner in respect of any sum properly paid on account of tithe rentcharge for which he was made liable under his contract. In other words, the occupier who was under a contract to pay the tithe rentcharge was not to pay the tithe rentcharge any more, but was to reimburse the owner after he had fulfilled the liability which primarily rested upon him under sub-s. 1 of s. 1 of the Act. Further, it was not overlooked that the owner might require to enforce payment of the sum so payable by the occupier, and by sub-s. 3 it is provided that the sum payable to the owner by way of reimbursement "shall be recoverable from the occupier by distress in like manner as is provided by sections 81 and 85 of the Act" of 1836. Thus the powers of distress which had been available to the owner of a rentcharge under the Act of 1836 were to continue for the benefit of the owner of the land who is entitled to be reimbursed and s. 81, which requires ten days' notice of distress to be given, and s. 85 are expressly mentioned as still available and in force for the purpose of enabling the owner to recover payment from the occupier.

The important section in the present case is, however, s. 2 of the Act of 1891. [His Lordship read sub-s. 1.] It will be at once observed that s. 2, sub-s. 1, makes a divergence of great importance from the conditions laid down in s. 81 of the Act of 1836. Under s. 81 of the Act of 1836 where the tithe rentcharge had been in arrear and unpaid for twenty-one days then ten days' notice was to be given and the power of the tithe owner to levy a distress then arose; under s. 2 of the Act of 1891, a sum is to be due in respect of tithe rentcharge for not less than three months before any right can be enforced, and thereupon no right is conferred which can be enforced immediately and directly by the tithe owner, but the right of the owner is to go to the county court. The county court are to give the owner of the lands notice of the application and are to hear him if he gives notice to oppose the application, and when that hearing has taken place, it is open to the county court to make an order that such sum as the Court thinks right shall be recovered "in manner provided by this Act." A contrast at once becomes apparent between the terms of that sub-section which give the right to recover "in manner provided by this Act," and the terms of sub-s. 3 of s. 1, which contains an express reference to s. 81 of the Act of 1836.

Then sub-s. 2 of s. 2 of the Act of 1891 provides: "Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers." It is again noticeable that the language in sub-s. 3 of s. 1 which I have already read, does not reappear in sub-s. 2 of s. 2. Sub-s. 5 says: "Any sum ordered by the court under this section to be recovered shall be payable by a trustee in bankruptcy, sheriff, or officer of a court who is in possession of the lands, in like manner as if it were tithe rentcharge recoverable under the Tithe Acts." That sub-section gives rise to the observation that it makes clear that the sum ordered to be recovered is not arrears of rentcharge such as were recoverable under the previous Acts.

It is said in the present case that a levy of distress made after the county court has determined the sum due under s. 2 of the Act of 1891 cannot be made unless and until the notice required by s. 81 of the Act of 1836 has been given. The questions at once arise: Who is to give the notice? Under s. 81 the notice was to be given by the person who was entitled to the tithe rentcharge. Under the Act of 1891 the owner of the tithe rentcharge cannot take any direct action of his own, he can only apply to the county court and the action of the Court is interposed between the tithe owner and the tithe payer. Has the Court then to give the notice or has the officer of the Court who levies the distress under sub-s. 2 of s. 2 to give the notice? It would seem that no such duty is imposed upon the Court, for if that were the intention it ought to be imposed expressly upon the Court. So too it is not imposed upon the officer of the Court, because once more such a duty ought to be imposed upon him expressly. Yet it is said that not only are the powers of distress conferred by s. 81 introduced into the special procedure set out in s. 2 of the Act of 1891 but that there is superimposed the duty of somebody to give this notice.

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Swift J. in his judgment refers to and reaffirms what he said when giving his decision in *New College, Oxford* (*Warden and Scholars*) v. *Davison* (1): "As a matter of law it was essential that the county court bailiff should give ten days' notice before he levied a distress under the order." That is a variance from s. 81. du Parcq J. in his judgment in the present case said (2) contrasting the notice of the application to the county court and the notice of the distress: "the second is a notice that something, which the officer of the Court who steps into the shoes of the owner of the tithe rentcharge has power to do, is about to be carried out—namely, a distress involving entry upon land which can only be rendered lawful by Act of Parliament." Here the learned judge adopts a metaphor; if it be true that the officer of the Court steps into the shoes of the owner of the tithe rentcharge I can follow the reasoning, but inasmuch as s. 2 cuts down the right of the tithe rentcharge owner and interposes an order of the county court before the owner of the tithe rentcharge can enforce his rights, it seems to me hardly a case in which one can say that the officer of the Court has stepped into the shoes of the owner of the tithe rentcharge. That reasoning, to my mind, does not appear conclusive. For myself I feel a difficulty in introducing the provision for a notice of distress in s. 81 of the Act of 1836 into the new procedure of a different nature which has been established and set up by s. 2 of the Act of 1891.

In the present case there was an application made by the owner of the tithe rentcharge to the county court, and upon that a notice was sent to the respondent, Mr. Thorne, dated April 18, and it was expressly stated in that notice: "If you wish to oppose the application you must, five clear days before the day appointed for the hearing, file with the registrar of this Court . . . . notice of opposition." Mr. Thorne did not appear, and an order was made by the county court on May 5 ordering that the sum of 12*l*. 18*s*. 7*d*. be recovered together with 7*s*. 6*d*. costs in respect of the tithe rentcharge on the land described in the first part of the schedule to the order, and for the purpose of such recovery Mr. Alfred Henry Cane was appointed by the Court to distrain upon those lands. When that order was made notice of the proceedings had already been given to the tithe payer and he could have appeared and presented his case to the county court; and after he had been heard, the question of amount and all other questions would have been for the Court. It is said nevertheless that ten days' notice of distress had to be given. If that notice has to be given under s. 2 of the Act of 1891, it must be a notice in respect of which s. 29 of the 1860 Act still holds good, so that a charge of 2*s.* 6*d.* can be made by the person giving the notice, a sum which is recoverable from the person who is in default. In the present case an order was made for a distress for so much and no more, and it did not include, and indeed could not include, this fee for the notice which could only have been sent subsequently.

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(1) 49 Times L. R. 579, 581.

(2) [1934] 1 K. B. 313.

The actual proceeding upon which this appeal arises is an application for leave to sell by tender which was made on April 6, 1933; it was from the order giving this leave that an appeal was brought, upon which the order of the Divisional Court was made. The point was then raised that the original order for the distress was wrong by reason of this notice not having been served, and that is how the matter came before this Court. It appears to me that the relevant sections of the Tithe Act, 1891, have introduced a new procedure which does not incorporate the duty to serve a notice of distress as required by s. 81 of the Act of 1836, although such a notice is required in the particular proceedings under sub-ss. 2 and 3 of s. 1. It is not without importance to observe that under s. 81 a distress is levied as of right by the owner of the tithe rentcharge against the tithe payer without the intervention of any other person, whereas in a case like the present the authority of the Court must be invoked and the order of the Court modifies and directs what the powers of the tithe owner shall be. In *Hutchins* v. *Chambers* (1), a case where there was a power of sale under distress, the distress no longer being held as a mere pledge,

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(1) 1 Burr. 579.

Lord Mansfield said: "But this reason does not hold, where the things distrained may immediately be sold by way of satisfaction, which, though called a distress, yet really is, in this respect, an execution." Lord Mansfield's observation is the more pertinent in a case where the proceedings are conducted entirely under the ægis of the Court and the power of distress cannot be exercised without the authority of the Court.

For these reasons I have come to the conclusion that the learned county court judge was right and that the appeal must be allowed and his order restored.

Slesser L.J. This appeal raises a question of importance regarding the conditions under which an order of a county court judge authorizing an officer of the Court to distrain for the recovery of sums owing to a tithe owner in respect of tithe rentcharge by the owner and occupier of lands may properly be executed by that officer.

It is argued in this appeal that the requirements of s. 2 of the Tithe Act, 1891, were not complied with in one particular only, though other objections were reserved for future adjudication. It is said that by reason of the failure to give the owner of the land ten days' notice in writing of intention to distrain the requirements of the section were not complied with and that power to levy distress was consequently lacking. The learned county court judge was of opinion that s. 2 of the Tithe Act, 1891, did not operate so as to require ten days' notice to be given and that the officer could distrain in the absence of such notice. On appeal, the Divisional Court, Swift J. and du Parcq J., were of opinion that it was essential to the validity of the distress that the ten days' notice to the tithe payer should be given as required by the Tithe Act, 1836, s. 81, as modified to suit the requirements of the Act of 1891; and it is from that decision that this appeal is brought.

An examination of the different remedies which have existed in the past for the wrongful detention of tithes—the subtraction of tithes, as it was technically called—and for the recovery of withheld tithe rentcharges or sums awarded in respect thereof reveals a variety of method under different statutes but discloses no specific principle.

A number of statutes from 13 Edw. 1 to 2 & 3 Edw. 6, c. 13, gave remedies in the spiritual courts for subtraction of tithes and required the withholder to pay double value. The suit as between persons other than both spiritual was limited to cases where the right to tithe was not disputed but was only a claim for the payment: (See 2 Inst., p. 612.) Other remedies were an action for debt upon the statute for treble value, and a suit in equity for the single value of the tithes and an account. Next a summary remedy for the recovery of small tithes was provided by 7 & 8 Will. 3, c. 6, and 53 Geo. 3, c. 127. These statutes, the latter increasing the sum recoverable to ten pounds, for the first time empowered the Court to assess as compensation a sum of money for the withholding of the tithe: (s. 2 of the Act of Will. 3) and go on to provide directly for the distraint of the goods and chattels of parties refusing or neglecting to pay the sum adjudged: (see s. 3 of the earlier Act); the refusal or neglect to pay being for ten days after notice given. This appears to be the origin of the requirement of ten days' notice to distrain which appears in the Act of 1836, which I consider later. It will be noticed that the distraint under those Acts was not in respect of tithe rentcharge but for a sum fixed by the justices in respect of the withholding of tithe, and therefore it was a sum certain.

The ten days' notice, however, was not invariably required in such statutes. Thus in the case of Quakers on a sum found to be due or ascertained for great and small tithes (extended by 53 Geo. 3, c. 127, s. 6, to 50*l.*), the justices might levy distress without giving the ten days' notice (7 & 8 Will. 4, c. 34, s. 4). Moreover, by a special Act applying to London (44 Geo. 3, c. 89) the London magistrates, if the sums assessed in lieu of tithes were not paid, might levy distress (s. 11) and this without notice. The Tithe Act, 1836 (6 & 7 Will. 4, c. 71) contained machinery for the commutation of tithes to tithe rentcharge, thus producing a distrainable subject-matter.

By s. 67, titheable lands were discharged from tithes for which they had generally been liable before that date and, in lieu thereof, it was provided that a rentcharge should be paid and that such rentcharge might be recovered at the suit of the person entitled thereto by distress and entry as provided in that Act. The machinery for such distress and entry was provided by ss. 81 and 85 of that Act. In s. 81, as in 7 & 8 Will. 3, c. 6, the provision that ten days' notice in writing is required is to be found and it is this provision which it is now sought to incorporate in the material section in this case, s. 2 of the Tithe Act, 1891, for in that section the obligation to give the ten days' notice does not in terms appear.

It is interesting to notice that as regards distress in general, that is, not necessarily distress in the nature of execution at Common Law, there was no obligation to give notice of distress, because all that was required was to seize the goods and impound them, and no notice was necessary then nor is necessary under statute unless a sale is intended. In the case of a sale, however, by the operation of various Acts dating from the Distress Act, 1690, 2 & 3 Will. & M., Sess. 1, c. 5, s. 1, it was necessary to give five days' notice. I instance these as showing the different methods which were employed by different statutes for accomplishing the end that the person whose money has been withheld should have recovery.

In the 1891 Act the Court was for the first time generally given jurisdiction in the matter of the distress. The right to distrain which arose under the 1836 Act when the rentcharge was in arrear and unpaid for twenty-one days after any half-yearly date of payment was varied and the power given to recover the tithe rentcharge did not arise unless it was in arrear for not less than three months. Thereafter it was provided by s. 2, sub-s. 1, that: "The person entitled to such sum may, whatever is the amount, apply to the county court . . . . in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with costs recovered in the manner provided by this Act, and tithe rentcharge . . . . shall not be recovered in any other manner."

Sect. 3 gives power to the Lord Chancellor after consultation with the Rule Committee of County Court Judges to make rules, and such rules dated April, 1891, and amended in 1926–27 and 1929 provide that "a person claiming to be entitled to a sum due on account of tithe rentcharge who desires to obtain an order of Court for the recovery thereof . . . . shall file with the registrar of the Court a notice of application" according to a prescribed form (r. 2). This form gave notice that the applicant would apply that the order for recovery should be executed by the appointment of an officer to distrain under s. 2, sub-s. 2, of the Act.

Next, it is required by r. 4 that the registrar should serve on the owner of the lands the notice of the application and also a notice in the prescribed form giving the defendant opportunity to oppose the application. It is also provided that "A respondent desirous of opposing an application shall, at least five clear days before the date appointed for the hearing, file with the registrar of the Court notice of his opposition . . . . and the registrar shall on the same day send notice thereof to the applicant" (r. 5).

These rules and forms which I need not further quote show that the jurisdiction and the rules thereunder provide a complete machinery for the marshalling of the application and opposition, if any, before the county court judge. Finally it is noteworthy that by r. 4 "the service shall be made at least ten clear days before the day appointed for the hearing of the application." Thus although the ten days to be given by the tithe owner to the tithe payer before the tithe owner himself may levy under s. 81 of the Act of 1836 does not appear in the Act of 1891, there is provision that the tithe payer shall have ten days' notice between the application and the date of the hearing of the matter before the county court judge.

But it is said that in addition to this ten days the tithe payer is entitled to another ten days' notice after the judge has authorized the distress and nominated an officer for this purpose. This argument, which certainly lacks all merit, in that the tithe payer has already had ten days in which to consider his position before the case is heard, and in that the exact sum due, as in the London Act of Geo. 3, has been judicially ascertained, is based upon the following considerations. It is pointed out that by s. 2, sub-s. 2: "Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers." And it is argued that the words "have the like powers of distraint . . . . as are conferred" by s. 81 of the Tithe Act, 1836, incorporate the necessity for the ten days' notice in writing which it is said is an essential element of those powers.

This view has found favour with Swift J. in the case of *New College, Oxford* (*Warden and Scholars*) v. *Davison.* (1) There he said (2), speaking of the 1891 Act: "The order was to be executed by a person appointed by the Court, who had the same powers as the owner of the tithe rent and no greater."

The learned judge thought that the combined effect of the two sections meant that the owner of the tithe was no longer to go on the premises and himself distrain but must go to the county court bailiff, who must give ten days' notice before he levied distress under the order.

In the present case the same learned judge took the same view, saying that he had nothing to add to his view as expressed in the *New College* case (1), and du Parcq J. was of the same opinion. In my judgment, this is an erroneous view to take and for this reason: I do not think that the condition of giving ten days' notice in writing under s. 81

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(1) 49 Times L. R. 579.

(2) Ibid. 580.

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of the Act of 1836 is a part of the power at all. The power therein contained is in these words: "It shall be lawful for the person entitled to the same . . . . to distrain," and in my opinion the ten days' notice in writing is but a condition which has to be satisfied before the power can be exercised and not a part of the power itself. What is given to the officer of the Court under s. 2, sub-s. 2, of the Act of 1891 is the like powers of distraint as in the Act of 1836 are given to the tithe owner, but their exercise is not subject to the like conditions. In the 1891 Act the conditions of the exercise of the power are the due service of the notices between the parties to which I have referred, the order of the county court judge and any further directions which he may think fit to give under Order xxiv., r. 37, of the County Court Rules. These conditions complied with, there remains only the actual power to distrain under the 1836 Act which is to be read in by reference to the powers of the officer under the Act of 1891.

Various other considerations were urged by Mr. Greene in support of this view--namely, that the notice under the 1836 Act is to be given by the person entitled to the rentcharge and cannot therefore be given by the officer of the Court who is not so entitled, that the expense of 2*s.* 6*d.* to which the owner is entitled from the tithe payer for serving the ten days' notice under s. 29 of the Tithe Act, 1860, is not provided for the service of a notice, if such be required, under the Act of 1891, whereas other expenses are there provided for and that whereas the Act of 1836 is dealing with the rentcharge due, the Act of 1891 is dealing with a different subject-matter—namely, a sum ordered by the Court to be paid in respect of rentcharge and expenses and, lastly, that when the Legislature is seeking under the Act of 1891, s. 1, to retain in certain limited circumstances which I need not detail obligations on the occupier to repay the owner and the machinery of distress contained in s. 81 of the Act of 1836 is invoked, the phrase used is "in like manner" and not "have the like powers," and Mr. Greene contends that the phrase "in like manner" is wide enough to cover the condition of giving the ten days'

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notice whereas the expression "the like powers" in sub-s. 2 is not.

In the matter of recovery of tithes or their equivalent I think I have made it clear that each statute and each Court has provided its own machinery on no recognizable or uniform principle, and I decide this case upon the ground which I have already indicated that the powers which the officer shall exercise are not the same thing as the conditions of the exercise of the power, and I do not repeat my reasons for coming to that conclusion, but I would add that Mr. Greene's further arguments are all consistent with that view.

I think, therefore, that the Act of 1891, s. 2, does not contemplate or require any further notice of distraint after the county court judge has given his final directions authorizing the execution of his order by the officer of the Court, and consequently this appeal must be allowed.

A further question was raised in the Court below, which was decided in favour of the appellants, that only those things which were tithable before the passing of the 1836 Act are proper subjects for distress and not all the goods and chattels upon the land. This argument, however, was not urged in the case before us by Mr. Wallington, who says that there is another appeal pending upon this point. I therefore express no opinion upon it and have decided this appeal without giving any consideration to that aspect of the case as it was urged in the Divisional Court.

Romer L.J. The question to be decided upon this appeal is, as I see it, quite a short one, and may be expressed thus. Do the words contained in s. 81 of the Tithe Act, 1836, "after having given or left ten days' notice in writing at the usual or last-known residence of the tenant in occupation," merely constitute a condition precedent to the exercise by the owner of the tithe rentcharge of the power of distress given to him by the section, or do the words form part of, and therefore qualify, the power itself? If the latter, then the officer appointed by the Court under sub-s. 2 of s. 2 of the Act of 1891, who is to have the like powers of distraint, would only have a power similarly qualified. In that case the officer of the Court would, by the joint operation of sub-s. 2 and s. 81 of the Act of 1836, have been given a power of distress in these words: "It shall be lawful for the officer, after having given or left ten days' notice in writing at the usual or last-known residence of the tenant in possession"—who in the case supposed is the owner-occupier—"to distrain upon the lands liable to the payment of a rentcharge or any part thereof for the sum ordered to be paid." I see no difficulty myself in applying the words in s. 81 of the Act of 1836 to sub-s. 2 if the respondents are right in their construction of s. 81. If however the words to which I have referred merely constitute a condition precedent to the exercise by the owner of the tithe rentcharge of the powers of distress given to him by s. 81, then there is nothing in sub-s. 2 of s. 2 of the Act of 1891 to suggest that the exercise by the officer of his power of distress is subject to the same condition precedent. In my opinion the words merely constitute a condition precedent to the exercise of the power. This I think is in accordance with the grammatical meaning and structure of the sentence which we have to construe. Sect. 81 of the Act of 1836 begins by saying that in a certain event, that is: "In case the said rentcharge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment"—words by which the exercise of the power conferred by the section is made conditional upon the happening of that event—"it shall be lawful for the person entitled to the same"—that is to the rentcharge. So far the section does not say what it shall be lawful for that person to do; the power has not yet been defined. Then the words in question are added; but even now they do not define the power, they merely seem to introduce another condition precedent to be satisfied before it shall be lawful for him to do whatever he is going to be empowered to do. The description of the power does not, as I read the section, begin until we come to the words "to distrain." Had the section said: "It shall be lawful for the owner to distrain upon the land liable for the payment thereof, or any part thereof, on giving ten days' notice, for all arrears of the said rentcharge," the matter might have been different; but in view of the words which have been actually used I am unable to accept the contention put forward on the part of the respondents.

The conclusion to which I have come seems to obtain corroboration from two considerations. One of those is that in sub-s. 3 of s. 1 of the Act of 1891, dealing with a case where there would be some reason for giving a notice before the exercise of a distress, whereas in the case contemplated by sub-s. 2 of s. 2 there is none at all, it is provided that the sum to which the sub-section is referring is to be recoverable from the occupier by distress "in like manner as is provided by ss. 81 and 85." That is a striking contrast with the words "the like powers of distraint" used in sub-s. 2 of s. 2. The other consideration is that if it was necessary for the officer of the Court to give a notice before exercising his power of distraint, one would have expected the Legislature to provide a fee for the giving of such a notice, a fee such as had been provided for by s. 29 of the Act of 1860; whereas when one looks at the schedule to the Act of 1891 which contains a statement of the fees which may be demanded under s. 2 of the Tithe Act, 1891, one finds no reference whatever to the giving of any notice and therefore no fee is provided for such a notice. It is said as against that by Mr. Wallington that in point of fact it was not necessary to provide for the fee because s. 29 of the Act of 1860 is still in operation and applies to a notice which he says ought to be given by the officer of the Court before exercising his power of distress. But on examination of s. 29 of the Act of 1860 it will be found that that is not so; the section is inapplicable to the officer of the Court exercising his power of distraint. The words of the section are: "If a rentcharge shall at any time be in arrear and unpaid, and in order to enforce payment thereof it shall become necessary for the person entitled to the same to give notice of his intention to distrain." Obviously those words do not apply to an officer of the Court exercising his power of distraint, who is in no sense the person entitled to the rent charge or entitled to the sum in respect of which he is about to levy his distress.

For these reasons I respectfully differ from the conclusion at which the Divisional Court arrived, and I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor to Queen Anne's Bounty; Edward F. Iwi.*

H. C. G.

TURTON *v.* TURNBULL.

C. A.
1934
April 25, 26.

Landlord and Tenant—Agricultural holding—Notice to quit—Reasons stated in accompanying letter—Validity—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12.

A notice to quit under the Agricultural Holdings Act, 1923, may be validly contained in two documents—one a formal notice to quit and the other an accompanying document which refers to that formal notice and states as the reason for giving it one or more of the causes set out in s. 12, sub-s. 1, of the Act.

Observations, per Slesser L.J., as to the scope of s. 12, sub-s. 9, of the Act.

APPEAL from the County Court of Yorkshire holden at Stokesley and Guisborough.

John Turnbull deceased was the tenant of Hall Garth Farm belonging to Robert Bell Turton (hereinafter called "the landlord") under a lease dated December 30, 1911, from year to year until notice to quit in writing should be given by either landlord or tenant. After the death of John Turnbull in June, 1931, his widow (hereinafter called "the tenant") continued in possession of the farm.

The landlord gave the tenant the following written notice to quit dated April 5, 1932: "Take notice that you are required to give up possession of the house, land, hereditaments and premises which the late John Turnbull held as tenant, of me as landlord, on the dates next succeeding the date of this notice, when under the terms of the agreement between us, the custom of the estate and the Agricultural Holdings Act, the said tenancy can first expire by notice" (Signed) "Robert Bell Turton." Accompanying that notice, and enclosed in the same envelope, was the following letter, dated April 1, 1932:

"Dear Mrs. Turnbull,

"You will remember that shortly after your husband's death, you called upon me to discuss the terms under which you could continue the tenancy of Hall Garth Farm. I told you that I had the greatest sympathy with you in your loss, and the greatest respect for the manner in which you conducted the part of the farm to which you more particularly devoted yourself, but I could not say that the arable land was farmed in accordance with the rules of husbandry, and it seemed to me impossible that you could effect an improvement in that respect. I therefore told you that I regretted that I must ask you to give up your tenancy of the farm. At the rent day I repeated what I said on the previous occasion, but I told you that our interests were identical. If you could make the farm pay, I should be sure of the rent. If you could not make it pay I should lose the rent. All that I wanted therefore was to see that you could make the farm pay, and I agreed to discuss the question with your brother if he came over to see me. More than two months have now passed and he has not made an appointment. Although under your husband's agreement notice will have been given in October the law now fixes April 6 which will soon be here. I am therefore bound to serve the notice which accompanies, but I can assure you that if I were satisfied that the farm was being, and will continue to be, well cultivated, I should be prepared to reconsider my decision. Yours very truly, (Signed) Robert Bell Turton."

In consequence of the notice to quit the tenant quitted the farm. Differences then arose on the question whether she was entitled to compensation for unreasonable disturbance upon quitting the farm, and those differences were submitted to a single arbitrator, before whom the following facts were admitted or proved: In June, 1931, the landlord verbally intimated to the tenant that he was not satisfied with the condition of the farm or the manner in which it was being farmed and that he would have to give her notice to terminate her tenancy; that on April 1, 1932, the landlord sent to the tenant the notice to quit and the accompanying letter, above set out, under the same cover; and that in consequence of the notice the tenant quitted the farm. The arbitrator found as a fact that the landlord did not give a valid notice to determine the tenancy within three months from the death of John Thomas Turnbull; and he further held that the notice to quit dated April 5, 1932, did not state the reason for which it was given, and he declined to treat the letter accompanying the notice to quit as incorporated with and as forming part of the notice to quit. He awarded a sum of 180*l.* as one year's rent of the farm as compensation for unreasonable disturbance. The question was whether he was right in so awarding.

The county court judge held that the arbitrator was wrong in declining to treat the letter accompanying the notice to treat as incorporated therewith, but that reading the two documents together they were not sufficiently clear and explicit to deprive the tenant of her right to compensation, and therefore that the arbitrator was right in awarding 180*l.* as one year's rent of the farm as compensation for unreasonable disturbance under the Act.

The landlord appealed.

John Neal and *R. H. Turton* for the appellant. The notice to quit and the letter accompanying it stating the reason for which the appellant was terminating the tenancy constituted a valid notice within s. 12, sub-s. 1, of the Agricultural Holdings Act, 1923. (1) No specific form of words is necessary

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(1) Agricultural Holdings Act, 1923, s. 12, sub-s. 1: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the tenant—(*a*) was not at the date of the notice cultivating the holding according to the rules of good husbandry . . . . and

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to constitute a valid notice: *In re Digby and Penny* (1), and there is nothing in the Act requiring that the notice must be contained in one piece of paper.

Secondly, the letter accompanying the notice to quit stated with sufficient clearness the reason why the notice was given —namely, that the tenant was not cultivating the farm in accordance with the rules of good husbandry. [They referred to *Norfolk County Council* v. *Child*. (2)]

C. T. Cohen for the tenant. A notice to quit under the Act must be a self-contained document; it is not a sufficient compliance with the statutory requirements to state the reason for giving the notice in a covering letter. Further, even assuming that the two documents in this case can be read together, the letter does not state with sufficient clearness the reason why the notice is given. A notice to quit must be absolute in its terms; that is, there must be plain, unambiguous words claiming to determine the tenancy: per Lord Coleridge C.J. in *Gardner* v. *Ingram*. (3) No such words are to be found in this letter, and therefore it fails to satisfy the requirements of the Act.

SCRUTTON L.J. This case raises a short point turning on the construction and legal effect of two documents which were enclosed in one envelope.

Sect. 12 of the Agricultural Holdings Act, 1923, interferes very seriously with a landlord's common law rights. Previously if a landlord terminated a tenancy by notice to quit he was under no legal obligation to pay compensation for determining

unless the notice to quit states that it is given for one or more of the reasons aforesaid, compensation for the disturbance shall be payable by the landlord to the tenant . . . .

Sub-s. 9: "The landlord shall, on an application made in writing after the thirty-first day of December, nineteen hundred and twenty, by the tenant of a holding to whom a notice to quit has been given which does not state the reasons for which it is given, furnish to the tenant within twenty-eight days after the receipt of the application a statement in writing of the reasons for the giving of the notice, and, if he fails unreasonably so to do, compensation shall be payable under this section as if the notice to quit had not been given for a reason specified in sub-s. 1 of this section."

(1) [1932] 2 K. B. 491.

(2) [1918] 2 K. B. 805.

(3) (1889) 61 L. T. 729, 730.

it. The Act of 1923 provides that in certain circumstances, if the landlord chooses to give notice terminating the tenancy he must say that he is terminating it for one or more of the reasons which are specified in s. 12. The Act further says that unless the notice to quit states that it is given for one or more of these reasons, compensation shall be payable by the landlord to the tenant in accordance with the provisions of the section. That kind of interference with the common law rights of landlords has been carried still further by the provisions of the Landlord and Tenant Act, 1927, and the Courts have to give effect to what the Legislature has enacted.

The question discussed before the arbitrator and the county court judge in this case is: did the landlord in the notice to quit state that it was given for one or more of the reasons mentioned in s. 12? As has been pointed out, one of the effects of not doing so is, even if the tenant has suffered no substantial damage, that the landlord has to pay a year's rent, and as by the Act he is being deprived of his common law rights, I think we must construe the Act with some liberality in his favour, or scrutinize the tenant's claim with some strictness.

The two documents we have to consider, one dated April 1 and the other April 5, were delivered to the tenant in one envelope. The problem of the effect of documents sent in one envelope comes before the Court not for the first time. Cases have arisen on this point under the Statute of Frauds, and the rule in these was that two documents could not be connected by parol evidence unless they contained some internal reference to each other. The question also arose whether parol evidence could be given that the documents were enclosed in the same envelope, if the documents did not refer to the envelope or the envelope to them. It was decided that parol evidence might be given connecting the documents with the envelope although neither referred to the other in writing, and that was used for the very practical purpose of connecting the name of the other contracting party as was done in *Pearce* v. *Gardner*. (1) I begin, then,

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(1) [1897] 1 Q. B. 688.

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with this: that the two documents which we have to construe reached the tenant in the same envelope. One of them is a notice to quit. That says nothing in terms about the reasons mentioned in s. 12. The other document says: "I am therefore bound to serve the notice which accompanies," and the reason is given for serving the notice. The question is, is that statement incorporated with the notice to quit? The position in fact was this: the tenant of the farm had been the husband of the lady to whom the letter and notice to quit were sent, and when the husband died the lady desired to continue the tenancy. In his letter accompanying the notice to quit, the landlord, after referring to her husband's death, said this: "I told you that I had the greatest sympathy with you in your loss, and the greatest respect for the manner in which you conducted the part of the farm to which you more particularly devoted yourself, but I could not say that the arable land was farmed in accordance with the rules of husbandry"—that is clause (*a*) of s. 12, sub-s. 1, of the Act—"and it seemed to me impossible that you could effect an improvement in that respect. I therefore told you that I regretted that I must ask you to give up your tenancy of the farm." I agree that that is merely a statement of what will be done in the future; but the letter proceeds to show that something must be done and it winds up thus: "I am therefore bound to serve the notice which accompanies, but I can assure you that if I were satisfied that the farm was being, and will continue to be, well cultivated, I should be prepared to reconsider my decision." That states his decision that she must give up the tenancy of the farm because it was not being cultivated in accordance with the rules of good husbandry—the same reason as that stated to her shortly after her husband's death, and again on the rent day. I am not going to lay down any precise and general rule as to the terms of a notice to quit; it is enough to say that it must make it reasonably clear to the tenant that it is being given for one or more of the reasons mentioned in s. 12. Further, if there are two documents they must be connected internally with each other; in this case it is sufficient that they were sent in the same envelope and one of them refers to and is to be read with the other; it is not necessary that each should refer to the other. The arbitrator was therefore wrong when he said that the two documents were not sufficiently connected with each other.

The question remains, do the two documents inform the tenant with reasonable clearness that the notice to quit is given because of one or more of the causes stated in s. 12? I think they make it reasonably clear to the lady that the notice was given because, in the opinion of the landlord, she was not cultivating the farm in accordance with the rules of good husbandry. That question of fact will of course have to be determined. The appeal will therefore be allowed and the matter remitted to the arbitrator for reconsideration.

GREER L.J. I agree. The arbitrator told the county court judge that the question for determination was whether he, the arbitrator, was right in law in awarding 180*l.* as one year's rent as compensation to the tenant for unreasonable disturbance in the circumstances set out in the special case. The arbitrator, subject to the case, held that the landlord had not given a valid notice to quit and therefore, in accordance with the Act, 180*l.* was due from the landlord to the tenant. The arbitrator so held for one reason; the county court judge upheld his award, but for a different reason; and now we have to decide whether or not there was a valid notice to quit. In my judgment there was a valid notice to quit given, for the reason that at that date the tenant was not cultivating the holding in accordance with the rules of good husbandry. After making some reference to what the landlord had said to the tenant on two previous occasions as to the land not being cultivated in accordance with the rules of good husbandry and expressing the view that it appeared to be impossible for it to be cultivated by the tenant in accordance with those rules, the letter proceeds thus: "I am therefore bound to serve the notice which accompanies but I can assure you that if I were satisfied that the farm was being, and will continue to be, well cultivated

I should be prepared to reconsider my decision." That last paragraph seems to me to mean that for the reasons which the landlord stated he was bound to give the notice to quit which accompanied the letter. If instead of being in a separate document the letter had said: "I am therefore bound to give you the notice you will find herein" the notice would clearly be a good notice to quit. I think it is equally clear that if instead of saying "the notice herein," it had said, "you will find my reasons indorsed on the back of this letter," it would have been a good notice, and in my judgment it is none the less good because it states the reason in a document which accompanied the notice to quit. I think that questions under this Act should be approached from the point of view mentioned by Bankes L.J. in *Jones* v. *Evans* (1), when he said: "I think it must have been within the contemplation of the Legislature that the kinds of dispute to which the section relates would in many cases arise between men who did not engage legal advisers, but who employed to assist them tenant farmers, agents, or valuers—persons who were very competent to deal with cases of this description, though not trained to draft formal legal documents." Regarded in that light I think these two documents combined show with sufficient clearness that the notice to quit was being given for the reason that the farm was not being cultivated in accordance with the rules of good husbandry. The county court judge was therefore wrong and the arbitrator was wrong in awarding 180*l*. on the ground that the notice given was not a valid notice. The question whether in fact the farm was not being cultivated in accordance with the rules of good husbandry has not been determined and therefore that matter must go back for determination.

SLESSER L.J. I am of the same opinion. Two questions arise for decision: one of limited application dealing with the correct interpretation of a particular letter, and the other a point of general importance. On the question whether the letter giving the reason for the notice to quit is sufficiently

(1) [1923] 1 K. B. 12, 17.

clear to satisfy the statute, I think the county court judge was wrong. I regard the concluding sentence of the landlord's letter where he says: "if I were satisfied that the farm was being, and will continue to be, well cultivated, I should be prepared to reconsider my decision," makes it clear to any one of reasonable intelligence that in his opinion the farm was not being well cultivated.

On the other matter the county court judge has differed from the arbitrator, but as the arbitrator has expressed a view which in my opinion is erroneous I think it necessary to deal with it. The argument for the tenant is that unless the notice to quit states in itself that it is given for one or more of the reasons mentioned in s. 12 it is invalid, and that we are not entitled to look at a document accompanying and connected with the notice stating the reason why the notice is given; in other words it is contended that a notice to quit, to satisfy the Act, must be in one document. I cannot agree. The two documents can be read together, and so read, they satisfy the requirements of the Act. In considering s. 12 I think that sub-s. 9 is informative. That sub-section says that "the landlord shall, on an application . . . . by the tenant . . . . furnish to the tenant . . . . a statement in writing of the reasons for the giving of the notice." If the argument is right that a notice to quit cannot be valid if the reasons for giving it are stated in an accompanying letter or other associated document, that would be a case where the notice to quit does not state the reasons, but in that event the tenant can claim under sub-s. 9 to be furnished with them and obviously they would have to be given in a separate document. If in this case the tenant claimed under sub-s. 9 to be furnished with the reasons for the giving of the notice the landlord would be compelled to send what he had already sent in the letter accompanying the notice. That may be the consequence of the language of the section, but I do not think it is. What s. 12, sub-s. 1, contemplates is a statement of the reasons for terminating the tenancy either in the notice to quit or in a document reasonably associated with it, and the tenant must be content to receive it in either form and

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cannot call upon the landlord to furnish the reasons again under sub-s. 9.

Appeal allowed.

Solicitors for appellant: *Withers & Co.*

Solicitors for respondent: *Gibson & Weldon, for Archer, Parkin & Townsend, Stockton-on-Tees.*

J. S. H.

Observation of GREER, L.J., at p. 222, *approved.* JACOBS *v.* L.C.C. [1950] 1 All E.R. 737.

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1934
May 14, 15, 16,

LONDON JEWELLERS, LIMITED *v.* ATTENBOROUGH.

SAME *v.* ROBERTSONS (LONDON), LIMITED.

[1933. L. 1352.]
[1933. L. 1353.]

Sale of goods—Goods obtained from owner by pretended customer on approbation—Fraud of customer—Goods pledged—Goods taken by pawnbroker in good faith—Validity of pledge—Customer whether a "buyer"—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 18, *r.* 4; *s.* 25, *sub-s.* 2.

Where a person who has received goods "on appro" pledges them he thereby does an act adopting the transaction within the meaning of the Sale of Goods Act, 1893, s. 18, r. 4 (*a*), so that the property in the goods passes to him, and the original owner cannot recover them from the bona fide pledgee.

Kirkham v. *Attenborough* [1897] 1 Q. B. 201 followed.

Where the owner of goods is induced, by a false representation made by another with fraudulent intent that he can sell them, to deliver the goods to that other on "appro," for the purpose of his endeavouring to sell them, the case is one not of larceny by a trick but of obtaining by false pretences. If, therefore, the fraudulent person pledges the goods before the contract between him and the true owner is avoided, the pledgee who takes bona fide obtains a good title as pledgee.

Folkes v. *King* [1923] 1 K. B. 282 applied.

Decision of Swift J. reversed.

APPEAL from a decision of Swift J. in two consolidated actions.

A man named Lewis Waller represented to London Jewellers, Ld., the plaintiffs, that he could sell certain of their goods to actresses, whereupon they handed to him various articles of jewellery, and with each of them a note showing its value and the words "On Appro," which Waller signed to show that he had received the article. These appro notes were all much in the same terms as the following :—

"12 Oct., 1932.

Mr. L. Waller.

Dr. to London Jewellers, Ld.,
418, Strand, W.C.2.
Dia. and Sapphire Platinum bracelet £350.
On appro.

(Signed) L. Waller."

Waller never sold or accounted for any of the articles, but as soon as he got them he handed them to one or other of three or four women, who pawned them in her own name, with the defendants. On becoming aware of what Waller had done, the plaintiffs informed the police who arrested Waller and in proceedings against him he pleaded guilty to larceny as a bailee and was sentenced to a term of imprisonment.

The plaintiffs thereafter sued the defendants for the return of the articles or their value, or alternatively for damages for conversion.

The defendants respectively stated in defence that the articles were not the property of the plaintiffs; that they were delivered to Waller on approval, or alternatively on sale or return, and that Waller or his agents pledged them; that the money given on the pledges was still owing; and that the defendants received the articles in good faith and without notice of any lien thereon of the plaintiffs.

It was admitted that in taking the articles the defendants acted in good faith and believed that they were treating solely with the women.

Waller stated in evidence that he had no intention of buying the articles himself, and that he had no intention at the time he obtained them of showing them to any customer, though, if he could have found some one who would have bought any of the articles from him he would have sold rather

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than have pawned it, but that his intention was, as soon as he obtained possession of the jewellery to get one of the women who acted on his behalf to pawn it for him and retain the proceeds for himself. He stated that he never in fact showed any of the jewellery to any one for the purpose of selling it.

Swift J. in the course of his considered judgment said that the defendants relied on four main grounds of defence. First, they said that an action for detinue would not lie as there had been no demand before action for the delivery up of the goods. In his opinion it was not essential to prove a demand, but, if it was, he was satisfied, having regard to the facts proved that the defendants knew that the goods were being demanded from them. The defendants' second point was based on the Sale of Goods Act, 1893, s. 18, r. 4, their contention being that the goods were delivered on approval, and that the time when the property would pass to the buyer was when either he did some act adopting the transaction, or at the expiration of the time fixed for the account to be settled, or on the expiration of a reasonable time. The defendants said thirdly, that they were protected by s. 25, sub-s. 2, of the Act of 1893, which stated that where a person, having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods, under any sale, pledge, or other disposition, to any person receiving the same in good faith and without notice of any lien, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner. If Waller had indeed been a buyer, s. 18, r. 4, and s. 25, sub-s. 2, of the Act of 1893 might have availed the defendants, but his Lordship found as a fact that Waller was not a buyer, and therefore this point also failed. The last point taken by the defendants was based on s. 2, sub-s. 1, of the Factors Act, 1889, which provided that where a mercantile agent is, with the consent of the owner, in possession of goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner to make the same; provided that the person taking under the disposition acts in good faith, and has not notice that the person making the disposition has not authority to make the same. That part of the case had given him (his Lordship) real difficulty. He had first to determine whether in fact Waller was a mercantile agent. In his opinion on the evidence he was not. He disguised himself as a mercantile agent merely for the purpose of obtaining possession of the plaintiffs' chattels. He was not a mercantile agent within the definition of that expression in s. 1, sub-s. 1, of the Act of 1889. In the next place, if Waller were a mercantile agent, the question arose whether he was with the consent of the owner in possession of the goods. His Lordship approached that question with some hesitation because of the state of the authorities with regard to it. In *Folkes* v. *King* (1) the Court of Appeal held that in the case of goods obtained by the mercantile agent by what amounted to larceny by a trick, a bona fide purchaser from him nevertheless acquired a good title, and his Lordship thought that, whatever his own views might be, he was bound by that decision although it seemed to be in conflict with the judgment of Kennedy L.J. in *Oppenheimer* v. *Frazer & Wyatt.* (2) The language of Lord Sumner in *Lake* v. *Simmons* (3) appeared to show that the question had not yet been finally determined. In the present case his Lordship was satisfied that Waller stole the jewellery by means of a trick and therefore took it without the consent of the owner, but he thought that he was bound by *Folkes* v. *King* (1), and he therefore held that if Waller were a mercantile agent he was in possession of the goods with the consent of the owner within s. 2, sub-s. 1, of the Act. But further, s. 2, sub-s. 1, did not protect the defendants, unless it appeared that the pledging of the goods was made by him in the

(1) [1923] 1 K. B. 282.
(2) [1907] 2 K. B. 50, 77.
(3) [1927] A. C. 487, 506.

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ordinary course of business of a mercantile agent. The defendants did not deal with Waller, or even know of his existence. His Lordship could not think that Waller was in fact pledging the goods in the ordinary course of business as a mercantile agent, and on the evidence he found as a fact that he did not do so. In the result he was of opinion that the plaintiffs succeeded, and there must be judgment for them for the return of the articles.

The defendants appealed.

Trapnell K.C. and *A. Safford* for the appellants. The decision of Swift J. was wrong. When Waller obtained the jewellery from the respondents on appro he did not, as Swift J. held that he did, commit larceny by a trick; on the facts he committed the offence of obtaining them by false pretence with the consequence that he obtained a voidable but not a void title to them, and as his title had not been avoided at the time of the pledge he could pass a good title to the pledgees who took them in good faith and without notice of Waller's defect of title: see Sale of Goods Act, 1893, s. 23. In *Whitehorn Bros.* v. *Davison* (1), Whitehorn gave pearls to one Bruford on sale or return on Bruford's fraudulent representation that he had a customer who would buy them. Bruford, who had no such customer, immediately pledged the pearls with Davison. There the members of the Court of Appeal expressed the opinion, although obiter, that Bruford obtained the pearls not by larceny by a trick but by fraud. In Archbold's Criminal Pleading (28th ed.), p. 540, the distinction between the two offences is stated thus: "In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." The dicta of the Lords Justices in *Whitehorn Bros.* v. *Davison* (1) were approved and followed by the Court of Appeal in *Folkes* v. *King* (2), which is a clear authority in favour of the present appellants for the proposition that where there is a bailment and delivery of an article for the purpose of the bailee himself exercising a disposing power over it, the bailee is not guilty of larceny by a trick although he may have obtained possession with the fraudulent intention of using his disposing power for his own purposes. Waller's act of pledging the jewellery was an act adopting the transaction and thereby the property passed to him under s. 18, r. 4, of the Sale of Goods Act: *Kirkham* v. *Attenborough*. (1) *Lake* v. *Simmons* (2) is distinguishable as there it was never contemplated by the jewellers that the woman to whom the pearl necklets were handed should sell them; she was merely given them as the messenger to her pretended husband whom the jewellers regarded as their customer.

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(1) [1911] 1 K. B. 463.
(2) [1923] 1 K. B. 282.

[*Kempler* v. *Bravingtons* (3) and *Buller & Co.* v. *Brooks* (4) were also cited.]

H. I. P. Hallett for the respondents. *Folkes* v. *King* (5) upon which reliance is placed by the appellants was merely a decision upon the question whether a mercantile agent was in possession of goods with the consent of the owner for the purpose of s. 2 of the Factors Act, 1889; it does not assist in the decision of the question in this case whether the property in the jewellery passed to Waller. Nor does s. 18, r. 4, of the Sale of Goods Act assist the appellants inasmuch as Waller was in no sense a buyer of the goods; he was in the same position in law as the woman in *Lake* v. *Simmons* (2)—namely, a person entrusted with the jewellery to show to some one else, and there was abundant evidence to support this view. Even if it could be said that prima facie there was a contract of sale between the respondents and Waller, there was no real consent by the respondents. Waller said in evidence that he never intended to buy the jewellery and it is clear that the respondents never intended to sell it to him. The very essence of the status of a buyer is that as a result of consensus he has a right to acquire for himself the property in the goods;

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(1) [1897] 1 Q. B. 201.
(2) [1927] A. C. 487.
(3) (1925) 133 L. T. 680.
(4) (1930) 142 L. T. 576.
(5) [1923] 1 K. B. 282.

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that cannot apply to Waller: see observations of Lord Selborne L.C. in *City Bank* v. *Barrow.* (1) In *Kirkham* v. *Attenborough* (2), the Court assumed that the fraudulent person had a right to buy for himself, and having that right must be assumed to have bought for himself. There is no room for that assumption in the present case as Waller's possession was clearly obtained by larceny by a trick.

Trapnell K.C. replied.

Scrutton L.J. This is another chapter in the chronicle of the judges dealing with a well-known commercial transaction commonly spoken of as "sale on appro," or "sale or return," and with it I can deal comparatively shortly, because, so far as we are concerned, the matter is in my opinion determined by two decisions of this Court—*Kirkham* v. *Attenborough* (2) and *Folkes* v. *King.* (3) I have already given two long judgments on the point involved and there is no object in repeating what I said in *Folkes* v. *King* (3) and *Kempler* v. *Bravingtons.* (4) In the latter case I gave an historical explanation of a series of cases.

The question arises out of a conflict of views on a commercial transaction. A person desiring to sell goods may do so by handing them to a person on "appro" or on sale or return. In such a case the person to whom they are thus handed is, in my view, given power to make a sale; being in possession of the goods he may conceivably deal with them contrary to his mandate; being sent out to sell, he may pledge. On the other hand, various people in the world of business, including pawnbrokers, may find themselves buying or taking in pledge goods which the person entrusted with them has been employed to sell, and the question is on whom is to fall the risk if the person in possession of the goods exceeds his mandate or acts contrary to it. On the one hand, the original owner of the goods says: "I never gave the person to whom I entrusted the goods any authority to do this; he had no title to pledge the goods with you." On the other side, the person with whom

(1) (1880) 5 App. Cas. 664, 670.
(2) [1897] 1 Q. B. 201.
(3) [1923] 1 K. B. 282.
(4) 133 L. T. 680.

they have been pledged says: "The man who pledged them had ostensible authority to do so and the risk must fall on you who employed an untrustworthy agent, and not on me, if I acted in good faith." Ever since *Kirkham* v. *Attenborough* (1), and probably ever since the passing of the Sale of Goods Act, that question has occasioned difficulty in the courts. In particular, the question which has caused acute division of judicial opinion is: If the owner of goods has entrusted them to an agent to sell, and the agent is a fraudulent person who has obtained the goods by misrepresentation, intending from the first to use them for his own advantage and not for the true owner, are the goods in his possession with that owner's consent? At this stage we get into the neighbourhood of larceny by a trick, a most bewildering subject, and the question then arises: Are the circumstances such that the agent has obtained the goods by false pretences, so that there is a contract giving him rights until the contract has been avoided, or is the agent simply a thief who therefore acquires no right to deal with the goods?

The facts of this case are very similar to those of other cases that have come before the Courts. A number of pawnbrokers are interested in it because a man named Waller, who has been fraudulent, or has been a thief, obtained goods from London Jewellers, Ld., either by specific representations that he knew some one who might like to buy them, or by general representations that he was in a position in which he would meet a number of people who were likely to buy them. The action was tried on two particular instances. As to one of them, that relating to a watch bracelet, the document in reference to it given by the plaintiffs to Waller was in these terms: "Mr. L. Waller, Dr. to London Jewellers Ld., 418, Strand, W.C.2: Dia. and Sapphire Platinum Bracelet, 350*l.*, On Appro. (Signed) L. Waller." 350*l.* is the price at which the plaintiffs were willing to sell, and it is common ground that the agreement with Waller was that anything he got for the bracelet above 350*l.* would be his remuneration. The other document, dated November 1, 1932, was this: "Mr. Waller,

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(1) [1897] 1 Q. B. 201.

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Dr. to London Jewellers, Ld., 418, Strand, W.C.2. On Appro., One Dia. and Plat. Watch, £185. L. Waller." The 185*l.* is the sum the plaintiffs were willing to take ; Waller could sell it for more if he could, and keep the surplus for himself as his profit on the transaction.

At the trial four points were taken on behalf of the defendants : first, that an action for detinue would not lie as there had been no demand before action brought. That probably has some relation to *Clayton* v. *Le Roy.* (1) Swift J. was of opinion that a demand was not necessary in detinue and further that there had in fact been a demand when on the conviction of Waller the plaintiffs applied to the magistrate for an order of restitution. I need say no more on that point because it was not taken in this Court. Secondly, it was said that the case came within s. 18, rule 4 of the Sale of Goods Act, 1893, which says that " When goods are delivered to the buyer on approval or ' on sale or return ' or other similar terms the property therein passes to the buyer :—(*a.*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction : (*b.*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time." That appears to contemplate that the person who has goods delivered to him on approval becomes a buyer to whom the property passes, not when he receives the goods but when he either approves or accepts the transaction, or does an act adopting it, or, being under an obligation to return does not do so within a reasonable time. Of course if the matter is looked at casually it seems odd that a man who is employed to sell and who pledges contrary to his mandate should be treated as a buyer, and it may be that the wording of the section is not very happy, but in *Kirkham* v. *Attenborough* (2), by which we are bound, it was decided that when a person who has received goods on sale or return pledges them, he thereby does an act adopting the transaction within the meaning of the Sale of

(1) [1911] 2 K. B. 1031.

(2) [1897] 1 Q. B. 201.

Goods Act so that the property in the goods passes to him, the reason being that he had no right to pledge them unless he was the owner. *Kirkham* v. *Attenborough* (1) has never been doubted and, therefore, unless it can be got out of the way, Waller made himself a buyer of the jewellery when he pledged it, a thing he could only properly do if he was the owner. The third point was that if s. 18 did not protect the defendants, s. 25, sub-s. 2, did. That sub-section provides as follows: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him . . . . under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith . . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." Swift J. held that Waller was not a buyer, and it is, of course, perfectly true that when he received the goods he was not a buyer because he was to deal with them either on appro or on sale or return; but the point emerges from a later case in this Court to which I shall refer, that the plaintiffs were not selling to Waller at the time but were giving him a right to sell, and that being so, when he exercised the right to sell he became a buyer. The last point put forward by the present appellants was under the Factors Act. To assist transactions of commerce a series of Factors Acts have been passed intended to protect a man who buys or takes a pledge in good faith, from a person who has apparent authority to deal with goods which are in his possession. Sect. 2, sub-s. 1, of the Factors Act, 1889, is in these terms: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the

(1) [1897] 1 Q. B. 201.

person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." A mercantile agent is defined thus in s. 1 of the Act: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." Swift J. said he was clear that Waller was not a mercantile agent at all, and, secondly, that he was not dealing with the goods in the ordinary course of business of a mercantile agent because what he did was not to go himself to the pawnbrokers or send a clerk of his who usually did the business of a mercantile agent, but to get various women of his acquaintance to go to the pawnbrokers and represent that they were the owners of the jewellery and desired to pledge it. Swift J. then in effect said this: "There is a decision of the Court of Appeal in *Folkes* v. *King* (1), which, though I do not like it, and though I should have decided it differently, binds me and prevents the defence of the Factors Act being available to the pawnbrokers. I should have thought that goods obtained by a thief were not in his possession with the consent of the true owner." The point of difference, not so much on the Factors Act because I doubt whether Greer J. who tried *Folkes* v. *King* (2) had his attention specially called to the Factors Act, between the Court of Appeal who took an opposite view in *Folkes*' case (1), to that taken by Greer J., whose decision was reversed, was this: there had been in two previous cases contradictory opinions expressed by judges of great eminence, but unfortunately in each of those cases those opinions were obiter. In *Oppenheimer* v. *Frazer & Wyatt* (3) Moulton L.J., the other members of the Court not expressing a very clear opinion on the subject, took the view that if the agent who obtained possession of the goods obtained them by larceny by a trick it followed that the owner of the goods had not consented to them being

(1) [1923] 1 K. B. 282.
(2) [1922] 2 K. B. 348.
(3) [1907] 2 K. B. 50.

in the possession of the person who so acquired them. On the other hand, four years later, in *Whitehorn Bros.* v. *Davison* (1), Buckley L.J. and I think Vaughan Williams L.J. expressed an opposite opinion, in this sense, that they thought, with one exception, where goods were delivered "on appro," if the consent was obtained by misrepresentation, it was not larceny by a trick, but was an obtaining of the goods by false pretences, and inasmuch as where a person obtains possession by false pretences the possession is valid until the contract under which possession was obtained is determined, the position was that the true owner had assented to the agent having possession, and there was a true consent. The exception, with which it is not necessary to deal in this case, was this: supposing there was a mistake as to the contracting party as there was in *Cundy* v. *Lindsay* (2), where a man represented himself to be Blenkiron, a person of high character, when in fact he was Blenkarn, a person of no character at all, there was no true consent because the parties were never at one. In such a case different questions may arise; I express no opinion with regard to it, but in *Phillips* v. *Brooks, Ld.* (3) Horridge J. referred to and considered a number of these cases and the point may have to be considered at some future time.

As I have said, Swift J. indicated pretty plainly that he would have decided *Folkes* v. *King* (4) as Greer J. decided it, but he felt bound by the decision of the Court of Appeal and he gave that as one of his reasons for rejecting the defence put forward under the Factors Act. In this Court, Mr. Trapnell, very wisely I think, has not rested his case upon the Factors Act because in view of the fact that Waller was not himself pledging the goods or pledging them by any authorized agent but was sending various women to say, quite untruly, that the jewels were their private property, it is impossible to bring the case within the protection of the Factors Act. But what puzzles me a little is that Swift J., recognizing that he was bound by *Folkes* v. *King*, (4) did not

(1) [1911] 1 K. B. 463.
(2) (1878) 3 App. Cas. 459.
(3) [1919] 2 K. B. 243.
(4) [1923] 1 K. B. 282.

consider that it is fatal also to his view on the second point that was taken. As I understand, he endeavoured to escape from the difficulty of the decision in *Kirkham* v. *Attenborough* (1) by saying that it applies only where the goods are in the possession of a buyer with the consent of the true owner. If what the agent has done—I am now using the term "agent" as a neutral term—is to get the goods by making false representations as to what he is going to do with them when he gets them, that is a case of obtaining them by false pretences, and he has a good title until the contract or the possession obtained by those representations is avoided; secondly, the agent having possession of the goods and the right to dispose of them until that contract is rescinded, he can pass the property in them either by selling them or by pledging them with pawnbrokers. I do not propose to repeat what I said in *Folkes* v. *King* (2). In that case Bankes L.J. quoted with approval the following passage from Buckley L.J.'s judgment in *Whitehorn's* case (3): "Prima facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences. It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud." Bankes L.J. supported that view by reference to various authorities. I took the same line. After pointing out the difference of opinion between Moulton L.J. on the one hand and Buckley L.J. on the other in *Oppenheimer* v. *Frazer & Wyatt* (4) and *Whitehorn Bros.* v. *Davison* (3) respectively,

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(1) [1897] 1 Q. B. 201.
(2) [1923] 1 K. B. 282.
(3) [1911] 1 K. B. 463, 479.
(4) [1907] 2 K. B. 50.

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I proceeded to deal with the question where a sale on appro goes wrong through a fraud of the agent. I first considered whether larceny by a trick is an answer to a defence based on the Factors Act, and, discussing a series of cases, I came to the conclusion that it is not; then I said (1): "But there is further the question whether the facts in this case constitute larceny by a trick. On this point I take the view taken by Channell J. and Vaughan Williams and Kennedy L.JJ., all very experienced in trying criminal cases, that where an owner delivers goods to an agent, intending not only that he shall have possession, but shall dispose of the property, it is immaterial that the agent, ostensibly agreeing to the contract of agency, yet secretly intends to disregard it." I then dealt with the authorities which supported my view. In my opinion the decision in *Folkes* v. *King* (1) prevents the view taken by Swift J. as to the effect of *Kirkham* v. *Attenborough* (2) being correct. I need not repeat the reasons which I gave for this conclusion; they are there to be agreed or disagreed with by a superior tribunal, but, so far as this Court is concerned, we are bound by them. The decisions of this Court in *Kirkham* v. *Attenborough* (2) and *Folkes* v. *King* (1) show that Swift J. came to an incorrect conclusion, and therefore this appeal must be allowed.

Greer L.J. I am of the same opinion. Swift J. held that the present respondents were entitled to succeed on the ground that the articles in question were stolen by Waller from the respondents, just as much as if, instead of making a pretence of being a purchaser on appro he had broken into their shop, pocketed the articles and pledged them. If it were open to me to decide in accordance with my own view of what ought to be the law, I should be disposed to agree with the decision of Swift J. The history of the development of the ordinary common law, both with regard to civil and criminal liability, is extremely interesting. It is the history of the gradual development of the law by means of fictions to enable the judges to do justice in cases that come before them, whether

(1) [1923] 1 K. B. 282, 306.

(2) [1897] 1 Q. B. 201.

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civil or criminal, where they have had to exercise a certain amount of imagination in bringing certain facts within the old forms of indictment or forms of action. There came a time when the judges had to decide this question : suppose a man obtains possession of goods intending from the start to steal them and use them for his own purposes, can he be described as a thief and can he be prosecuted for larceny at common law without the assistance of any statutory definition of what larceny means ? In Stephen's History of the Criminal Law, vol. 3, p. 160, I find this : "It was held at a very early period in the history of the law that, though a wrongful taking is essential to theft, it is nevertheless theft to obtain the possession of a thing by fraud and then to appropriate it. A. asks B. to allow him to try B.'s horse, and having got leave to mount for that purpose rides off with the horse. Here the taking is permitted by B., and is so far lawful, but, inasmuch as the leave of B. is obtained by a fraud, the taking under the fraud is regarded as wrongful, and the subsequent conversion as theft," so as to bring the case within an indictment which contained the old word "asportavit," that is, took away from the true owner. That being the position in law, the judges then had to consider the problems arising where not merely possession but property was obtained, and they found themselves unable to bring such a case within the law of larceny at common law, and therefore recourse was had to Parliament to make the obtaining of property by false pretences a substantive crime. It was not a felony but a misdemeanour, larceny being still a felony. In those circumstances the Courts have had to decide in several cases what the position is where, in the first instance, possession only is obtained, but obtained under an arrangement or contract whereby at some subsequent period the possession can be converted into property and ownership. Mr. Hallett says that the present case is an instance of an agent selling on behalf of a principal ; not a case where he was ever intended to become the owner of the property in the goods at all ; his commission being measured by anything he could obtain over the fixed price. If I thought that was the real meaning of the transaction I should be of opinion that this appeal failed, but having regard to documents that passed when any one of the articles of jewellery was handed to Waller, it is impossible to hold that he was an agent for sale, notwithstanding that there was in the mind of the respondents' manager some confused idea that Waller might be selling under a mandate from them. Business people who sign documents must be bound by them, and in every case Waller signed a document which treated him as the person who was dealing with the respondents on the terms that unless the goods were returned in accordance with the agreement he should be their debtor and he was taking the goods on sale or return. In those circumstances it is impossible to argue this point with success, though if there were any possibility of doing so the ingenuity and ability displayed by Mr. Hallett would have been able to produce a sufficiently convincing argument. Sect. 18 of the Sale of Goods Act, 1893, begins by saying: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer," and then r. 4 says this: "When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer:—(*a*) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction." Treating this, for the purposes of that section, as an honest and not a dishonest transaction it seems to me that the goods were delivered to Waller on approval or on sale or return or other similar terms with the consequence that the property would pass to him at some future time, that is, whenever he signified his approval or acceptance to the seller or did any other act adopting the transaction. Such a contract leaves the seller in the hands of the buyer to a large extent, because the buyer has the opportunity behind the seller's back of doing something which shows that he is adopting the transaction, and in *Kirkham* v. *Attenborough* (1) it was held that pledging is an act which adopts the transaction.

(1) [1897] 1 Q. B. 201.

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Mr. Hallett then says that from the very commencement there was an intention on Waller's part to steal the jewellery; that therefore he could not acquire or pass any property in it, for it is common ground that a thief neither by sale nor pledge can convey an interest in property stolen by him to a third person unless he sells in market overt, and here there is no question of market overt or indeed of any sale. I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift J. and which commended itself to me in *Folkes* v. *King* (1), but that view is not open to us in view of the decision of the Court of Appeal in *Folkes* v. *King*. (2) In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first; we must take both as forming the ground of the judgment. The second reason was this, that where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick. If that is right it binds this Court to hold that in this case there was no larceny by a trick but an obtaining by Waller of the goods by false pretences, although I find it difficult to understand the logic of the position. Whether I agree or disagree with that position, I am bound by the unanimous judgments of the Court of Appeal in *Folkes* v. *King*. (2) I think therefore for the reason I have given that this appeal must be allowed.

Maugham L.J. I am of the same opinion. In the first place I may observe that this is the kind of case with which the Courts have often had to deal, the question being which of two innocent parties is to suffer. The basis of Swift J.'s judgment is that Waller was a thief ab initio; that in the transaction between the plaintiffs and Waller there was accordingly no contract, and Waller was no more a buyer than, to use the picturesque phrase of the learned judge, a person

(1) [1922] 2 K. B. 348.

(2) [1923] 1 K. B. 282.

who throws a brick through a jeweller's window and abstracts articles of jewellery, although by sufficiently concealing his criminal intent he may have deceived the plaintiffs into thinking that he was a buyer. The first thing we have to determine is whether the effect of Waller's pledge is to reduce the contract between the plaintiffs and Waller to a nullity. The learned judge's view is no doubt attractive, but it appears to me on the authorities that whether it be a case of vendor and purchaser or of vendor and agent for sale, if the intention of the vendor was that the property as well as the possession should pass, the result is that the contract is voidable only and not void: see the cases in support of that doctrine in Benjamin on Sale, 7th ed., pp. 474 et seq. The exception to that rule is exemplified in *Cundy* v. *Lindsay* (1), where it was held that there was no contract, because the person who had pretended to contract as buyer was not the person with whom the vendor was contracting. Leaving however that exception on one side, I am of opinion that the original contract with Waller was voidable at the election of the vendors and was not void ab initio; and if under, or as the result of, that contract the property as well as the possession passed, the fraudulent Waller could transfer to an innocent third party for valuable consideration a special property in the goods. That I think is beyond question, assuming that the sale was one out and out with a provision for payment in the future. In this case, however, the sale was "on appro," and logically the next point to consider is the true nature of the actual transaction between the vendors and Waller. On that I have little to add to what my brethren have said. The terms of the "appro" notes which were prepared in the same way as if Waller were the purchaser, starting with the words: "Mr. L. Waller, Dr. to London Jewellers Limited," with the date, the words "on appro," a description of the goods and the prices, and in some cases the words "To be settled on or before" a particular date, and these documents were signed by Waller. In these circumstances I cannot believe that, contrary to the terms of the documents, Waller was not intended to have the right to purchase the goods for the purpose of transferring the property in them to a third party. When it is added that he was at liberty to sell the goods for any price he liked above the figure mentioned, and that his only duty was to pay the amount mentioned in these invoices or to return the goods, the conclusion is inevitable that he was a conditional purchaser of the goods; that is to say, when he found one of the so-called customers with whom he said he was in touch, he was at liberty, as soon as he arranged for a sale to that customer, to approve of the conditional sale to him and to pay the amount mentioned in the invoices to the London Jewellers, Ld. I can see no distinction between a contract on sale or return and a contract on appro, at any rate for the purpose of this case. To use the language of Kennedy L.J. in *Whitehorn Bros.* v. *Davison* (1) "there was a bailment and delivery, and not that alone, but a bailment and delivery for the purpose of the person to whom the article was delivered himself exercising a disposing power over the property." Having come to that conclusion, the question then is whether the fact that the property did not at once pass to Waller entitled the respondents to succeed. That, I think, is no longer a question of doubt having regard to the decision of this Court in *Folkes* v. *King*. (2) There, it is true, the defendant acquired a good title by virtue of s. 2 of the Factors Act, 1889, and the effect of that section has not been a matter of discussion in the present case. But in *Folkes* v. *King* (2) the Court, following dicta in *Whitehorn Bros.* v. *Davison* (1), came to the conclusion that the mercantile agent in that case had not rendered himself liable to be convicted of larceny by a trick inasmuch as he was authorized by the plaintiff to pass the property in the car to a purchaser. In this case the point is not whether Waller could have been convicted of larceny by a trick, the question is whether there was an intention, subject to an approval by him, to transfer the property as well as the possession to him. The question whether he could be guilty of larceny by a trick is only a test whether the property would or would not pass by

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(1) 3 App. Cas. 459.

(1) [1911] 1 K. B. 463, 485.

(2) [1923] 1 K. B. 282.

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this agreement on the fulfilment of the condition. To my mind *Folkes* v. *King* (1) establishes that the property as well as the possession would pass on the performance of the condition, and inasmuch as London Jewellers, Ld., had not before then exercised their right of avoiding the contract, it follows that Waller was entitled to pledge the property to an innocent third party for valuable consideration. For that *Kirkham* v. *Attenborough* (2) is conclusive. Where goods are on sale or return or on appro, s. 18 of the Sale of Goods Act, r. 4, applies; and as to that rule I would only add that if the goods had simply been sold with a provision for payment in the future there would have been no necessity to rely upon the provisions of that statute since, according to the old common law rules, that would be a case where a person who had obtained the property in goods by fraud could in law before the vendor exercised his power to disaffirm the transaction, confer a title thereto upon another person if the latter took innocently and for value. Having regard to the authorities this appeal must succeed.

Appeal allowed.

Solicitors for appellants: *Attenboroughs.*
Solicitors for respondents: *White & Co.*

(1) [1923] 1 K. B. 282.

(2) [1897] 1 Q. B. 201.

J. S. H.

1934
Jan. 12.

LANCASHIRE COUNTY COUNCIL *v.* BIRKENHEAD BOROUGH COUNCIL.

Poor Law—Settlement—Deserted married Woman—Poor Law Act, 1930 (20 *Geo.* 5, *c.* 17), *ss.* 84, *sub-s.* 2; 85, *sub-s.* 2; 86, *sub-s.* 2.

A married woman, deserted by her husband, may acquire a settlement for herself, but by residence only, under s. 84, sub-s. 2 (*b*) (i.), and s. 86, sub-s. 2, of the Poor Law Act, 1930, and not by any of the other ways enumerated in s. 84, sub-s. 2 (*b*).

Case stated by Lancashire Quarter Sessions.

At a sitting of the court of quarter sessions on July 13, 1933, the respondents, the Birkenhead Borough Council, appealed against an order of the Preston justices adjudging that Elizabeth Victoria White Cowan, a rate-aided person of unsound mind and an inmate of the county mental hospital at Lancaster, was settled in the respondent borough, and directing that the respondents should pay to the appellants the costs of her maintenance in the hospital. The appeal was allowed, but quarter sessions stated this case.

The following facts were found by quarter sessions: (i.) The said E. V. W. Cowan ("the poor person") was about 46 years of age and was the wife of Robert Cowan. (ii.) Robert Cowan had a settlement by residence in the respondent county borough. (iii.) Robert Cowan married the poor person in December, 1931. (iv.) The poor person on April 9, 1932, purchased a house, "Westyrdene," Station Road, Burton, Cheshire, and lived there with her husband, Robert Cowan, until April 30, 1932. (v.) On April 30, 1932, Robert Cowan deserted the poor person and went to live with his mother in the respondent county borough of Birkenhead, where he remained until February 27, 1933. (vi.) On October 3, 1932, the poor person paid the whole of the rates in respect of "Westyrdene" aforesaid for the period from April 9, 1932, to March 31, 1933. (vii.) On October 15, 1932, the poor person vacated "Westyrdene" and went to reside as a lodger at Netherton Hall, Frodsham, Cheshire. (viii.) On January 1. 1933, the poor person left Netherton Hall and went to reside with her brother at Seaforth, Lancashire. (ix.) On January 25, 1933, the poor person was removed to Smithdown Road Hospital, Liverpool, Lancashire, as a person of unsound mind. (x.) On February 4, 1933, the poor person was received into the county mental hospital in Lancashire as a rate-aided person of unsound mind.

It was contended for the appellants: (i.) that the poor person took her place of settlement from her said husband, Robert Cowan, whose place of settlement was admittedly the respondent county borough of Birkenhead; (ii.) that the poor person could only acquire a settlement other than that of her husband by three years' residence, and that she had not resided long enough in the appellant county to so acquire a settlement.

For the respondents it was contended (1.) that the poor person, being a deserted woman, did not take her place of settlement from her husband, Robert Cowan; (2.) that the poor person had acquired a settlement in the appellants' county, Lancashire, (*a*) by estate, (*b*) by payment of rates and taxes, (*c*) by residence.

The court of quarter sessions decided that the poor person was not settled in the county borough of Birkenhead, but stated this case.

By the Poor Law Act, 1930 (20 Geo. 5, c. 17), it is provided:—Sect. 84: "(1.) A person shall be deemed to be settled in the county or county borough in which he was born until it is shown that he has derived or acquired a settlement elsewhere. . . . . (2.) Subject to the provisions of this part of this Act, a person may, in manner hereinafter provided . . . . (*b*) acquire a settlement in a county or county borough by (i.) residence, (ii.) apprenticeship, (iii.) estate, (iv.) renting a tenement, or (v.) the payment of rates or taxes. . . . ."

By s. 85: ". . . . (2.) Subject to the provisions of the next succeeding section as to a married woman deserted by her husband, a married woman shall take and follow the settlement of her husband, and shall retain the settlement which she thus had at the date of his death or of the dissolution of the marriage until she acquires or derives another settlement. . . . ."

By s. 86 : "(1.) Where a person has resided for a term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act render him irremovable, he shall be deemed to be settled in that county or county borough. (2.) A married woman deserted by her husband may acquire for herself a settlement by residence."

Basil Nield for the appellants. The question is whether a married woman, deserted by her husband, can acquire a settlement for herself in any other way except by residence. It is submitted that she cannot. It is admitted that the husband of the poor person is settled in the respondent borough. By s. 85, sub-s. 2, of the Poor Law Act, 1930, a married woman takes and follows her husband's settlement, but the sub-section reserves the case of the married woman deserted by her husband for special treatment, and s. 86, sub-s. 2, enables her to acquire a settlement for herself, but in terms limits the concession to settlement by residence. The various ways enumerated in s. 84, sub-s. 2, of gaining a settlement do not apply to the poor person, except sub-cl. (*b*) (i.), "by residence": see s. 86, sub-s. 2. In this case the poor person has not had time since she was deserted to acquire a settlement for herself by residence; therefore, she follows the settlement of her husband in the respondent borough.

David Karmel for the respondents. Sect. 84, sub-s. 2, does not purport to exclude anybody from the rights of acquiring a settlement conferred therein, and "person" would include the poor person in the present case, who has, therefore, acquired a settlement for herself under s. 84, sub-s. 2 (*b*) (v.), by payment of rates. Sect. 85, sub-s. 2, and s. 86, sub-s. 2, are merely declaratory of the law, and s. 86, sub-s. 2, is surplusage, for s. 84, sub-s. 2 (*b*) (i.), had already given the poor person her right to acquire a settlement by residence. Sect. 85, sub-s. 2, includes married women, whether deserted or not. The word "may" in s. 86, sub-s. 2, is important, for if the Legislature had intended that sub-section to be exclusive or prohibitive it would have used a stronger word.

[*Paddington Guardians* v. *St. Matthew, Bethnal Green, Guardians* (1) was referred to.]

LORD HEWART C.J. I am clearly of opinion that this appeal ought to be allowed. The Poor Law Act, 1930, deals in s. 84 with settlement in general, and it is true that by sub-s. 2 a person may obtain a settlement in the various ways therein specified. But then follows s. 85, sub-s. 2, which provides that a married woman shall take and follow the settlement of her husband. But this is subject to the provisions of s. 86. Now the provisions of s. 86 are provisions for acquiring a settlement by residence. Sub-s. 2 in terms enacts that a married woman, deserted by her husband, may acquire for herself a settlement by residence. Reading ss. 85 and 86 together I think the Act clearly lays down that a married woman, deserted by her husband, takes and follows his settlement unless and until she acquires for herself a settlement by residence. Here it is agreed that the husband had acquired a settlement in Birkenhead by residence, and deserted his wife, the poor person, in April, 1932, and there has not been time for her to acquire by residence a settlement other than his. I think, therefore, that the contentions on behalf of the appellants are correct and that the appeal should be allowed.

AVORY J. I am of the same opinion. It is to be observed that the provisions of s. 86, sub-s. 2, of the Act of 1930 adopt the law laid down in *Paddington Guardians* v. *Bethnal Green Guardians*. (1) In that case it was argued that a married woman, whether deserted or not, could not acquire a settlement apart from her husband. Mr. Rawlinson there contended (2) that there was no case where a married woman could acquire a settlement apart from her husband, but nevertheless the Court of Appeal held that a deserted wife could, under the Divided Parishes and Poor Law Amendment Act, 1876, acquire a settlement by residence in a parish for three years. Sect. 86, sub-s. 2, of the Act of 1930 adopted the law as there laid down. Therefore, the only question is whether, as quarter sessions appear to have thought, a married woman, deserted by her husband, can be within the provisions of s. 84, sub-s. 2. In my opinion ss. 85, sub-s. 2, and 86, sub-s. 2, form a code of law which governs the position of a deserted married woman, the effect of which is that she retains her husband's settlement until she acquires a fresh one by three years' residence. In those circumstances I agree that the appeal should be allowed.

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(1) [1913] 1 K. B. 508, 513.

(2) Ibid. 510.

MACKINNON J. I agree.

Solicitor for appellants: *Sir George Etherton, Preston.*
Solicitor for respondents: *Town Clerk, Birkenhead.*

W. L. L. B.

1934
Jan. 12.

HUGGETT *v.* HELP YOURSELF STORES, LIMITED.

Weights and Measures — Sale of Food — Misrepresentations — Pre-packed Article—Sale of Food (Weights and Measures) Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 4, *sub-s.* 2 (*b*)—*Sale of Food (Weights and Measures : Pre-packed Articles) Regulations,* 1927 (*S. R. & O.*, 1927, *No.* 528), *reg.* 2, *cl.* 8.

By s. 3 of the Sale of Food (Weights and Measures) Act, 1926, a person in offering for sale an article of food is forbidden to make any misrepresentation as to its weight. Sect. 4, sub-s. 1, provides that in the case of certain specified articles [which includes lentils] the weight of the wrapper may be included in the weight purported to be sold if its weight is not proportionally heavier than specified. By s. 4, sub-s. 2 (*b*), the wrapper, where the article is pre-packed and the weight of the wrapper is permitted to be included in the weight sold, must bear a true statement of the " minimum weight " of the article with its wrapper. By reg. 2, cl. 8, of the Sale of Food (Weights and Measures : Pre-packed Articles) Regulations, 1927, in this latter case the wrapper must bear the words " gross " or " gross weight " in addition to the indication of weight.

The respondents offered for sale three packets of lentils bearing on the wrappers the words " 1 lb. net," the packets in fact containing less than one pound of lentils alone. :—

Held, that " minimum weight " in s. 4, sub-s. 2 (*b*), meant minimum gross weight, and that, consequently, the respondents had made a misrepresentation as to the weights of the packets under s. 3 of the Act, and had also infringed the provisions of reg. 2, cl. 8, of the regulations in omitting to add the words "gross" or "gross weight."

Held, further, that reg. 2, cl. 8, was not ultra vires.

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CASE stated by Sussex justices.

An information was preferred by the appellant, acting on behalf of the West Sussex County Council, against the respondents, Help Yourself Stores, Ld., charging that on April 25, 1933, in exposing for sale certain articles of food, to wit lentils, they made misrepresentations calculated to mislead intending purchasers as to the weight of the articles exposed for sale, contrary to s. 3 of the Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63).

The following facts were found in the case. The respondents were a limited company owning (inter alia) a grocery stores at 34 Carfax, Horsham, of which one Victor Barnett was the manager. On April 25, 1933, one Frederick Knott, a duly appointed officer under the Act, entered the above stores, and in the presence of Barnett weighed the contents of certain prepacked packets of food, including three packets of lentils. Each of the packets was marked with the words "1 lb. net" on the wrapper, and upon being weighed the total weight of the contents, exclusive of the weight of the wrappers, was as follows: the first packet—15 oz. 12½ drams. The second packet—15 oz. 11½ drams. The third packet—15 oz. 12 drams. No representation as to weight, other than that which appeared on the packets, was made, either verbally or otherwise.

The packets were weighed up and packed at other premises of the respondents at 3 Ebury Street, London, and were delivered at the above stores at Horsham in the form in which they were found by Knott.

By s. 3 of the Sale of Food (Weights and Measures) Act, 1926: "A person shall not on or in connection with the sale of any article of food, or in exposing or offering any article of food for sale, make any misrepresentation either by word of mouth or otherwise, or commit any other act calculated to mislead the purchaser or prospective purchaser, as to the weight or measure of the article, or, if any articles are being

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sold or offered for sale by number, as to the number of articles sold or offered for sale."

Sect. 4: "(1.) A person shall not sell any article of any of the kinds of food set forth in the First Schedule to this Act otherwise than by net weight except that, in the case of articles specified in Part II and Part III of that Schedule, where the article is weighed for sale in a wrapper or container the weight purported to be sold may include the weight of the wrapper or container if the weight of the wrapper or container does not exceed" certain proportional weights which were not exceeded in the present case.

"(2.) A person shall not sell or have in his possession for sale any pre-packed article of food of any of the kinds set forth in the First Schedule to this Act, unless . . . . (*b*) the wrapper or container bears thereon, or on a label securely attached thereto, a true statement in plain characters of the minimum net weight of the article contained therein, or, in any case where the weight of the wrapper or container is permitted by the preceding sub-section to be included in the weight purported to be sold, of the minimum weight of the article with its wrapper or container."

By interpretation, lentils are included among the articles enumerated in Part III. of the First Schedule to the Act. By s. 9, sub-s. 1 (*d*), power is given to the Board of Trade to make regulations for the purpose (inter alia) of prescribing the manner in which indications of weight are to be marked on pre-packed articles. Pursuant thereto, the Board of Trade made the Sale of Food (Weights and Measures: Pre-packed Articles) Regulations, 1927 (S. R. & O., 1927, No. 528). By reg. 2, cl. 7: "Where the weight to be indicated is the net weight of the article of food enclosed in the package, the denomination or denominations of weight, together with the number of units thereof, shall either stand alone or shall be followed by the word NET or preceded by the words NET WEIGHT, as for example:—

2 lb.
Two pounds net.
Net weight 1½ lb.
1 lb. 12 oz. net."

Reg. 2, cl. 8: " Where the weight to be indicated includes the weight of the wrapper or container in which the article has been weighed for sale the denomination or denominations of weight together with the number of units thereof shall be either followed by the word GROSS or preceded by the words GROSS WEIGHT, as for example :—

2 lb. GROSS.
GROSS WEIGHT 2 lbs."

The draft of these regulations, in accordance with s. 9, sub-s. 2, of the Act of 1926, had been duly laid before both Houses of Parliament.

The justices dismissed the information, but stated this case.

Harold Brown for the appellant. The justices were wrong. Under s. 3 of the Act of 1926, the respondents were forbidden to make misrepresentations calculated to mislead the purchaser of an article of food. Here they represented that they were selling in each of these packets 1 lb. of lentils. In fact, in each packet, they were selling a less quantity than one pound. Therefore they offended against s. 3 of the Act. By s. 4, sub-s. 2 (*b*), the respondents were authorized to sell pre-packed packets of lentils if the wrapper containing them bore thereon or on a label attached thereto a true statement of the " minimum weight " with the wrapper, this being a case where, under s. 4, sub-s. 1, the weight of the wrapper was permitted to be included in the weight purported to be sold. And this must mean the gross weight, and accordingly, reg. 2, cl. 8, of the regulations of 1927, says that the words " gross " or " gross weight " must appear on the label. They did not so appear in this case. Therefore the respondents offended against both the Act and the regulations.

Eric Neve for the respondents. Sect. 4, sub-s. 2 (*b*), of the Act says that in the case of pre-packed articles, where the weight of the wrapper is permitted to be included in the weight purported to be sold, which was the case here, the wrapper must state the " minimum weight " of the article and its wrapper. " Weight," unless otherwise specified, always means net weight, and the word " gross " nowhere appears in the

Act, and the wrapper did contain a statement of the net weight. Reg. 2, cl. 8, is in direct contradiction of s. 4, sub-s. 2 (*b*), of the Act, and is therefore ultra vires. The fact that a draft of these regulations was laid before both Houses of Parliament and there has been no objection to them does not make them intra vires, for regulations cannot override the Act of Parliament.

LORD HEWART C.J. I think it is clear that this appeal ought to be allowed. If one looks at the scheme of the Act of 1926, it is apparent that a contrast is pointed between the case where articles are weighed for sale, which is sub-s. 1 of s. 4, and the case where the article is pre-packed, which is sub-s. 2 of the section.

It is found as a fact in this case that the lentils were a pre-packed article, and therefore come under s. 4, sub-s. 2, which provides that in any case where the weight of the wrapper or container is permitted by sub-s. 1 (*b*) to be included in the weight purported to be sold the wrapper or a label attached thereto must contain a statement of the minimum weight of the lentils with the wrapper. The respondents did not comply with that provision, but on the contrary employed the words "net weight." Therefore they have clearly contravened the provisions of s. 4, sub-s. 2, of the Act.

But, further, there is power under s. 9 of the Act to make regulations, and under that power the Sale of Food (Weights and Measures: Pre-packed Articles) Regulations, 1927, were made, and our attention has been drawn to reg. 2, cl. 8, of those regulations. I see no ground for saying that that regulation is ultra vires, even if the justices decided the case on that basis. But, in their opinion set out in the special case, I do not see any reference to that regulation.

It appears to me, therefore, that the respondents have doubly offended, both against the clear words of sub-s. 2 of s. 4 of the Act, and against cl. 8 of reg. 2 of the regulations, which, as I have stated, is, in my view, intra vires. When one looks at the opinion of the justices it seems clear that they have confused the provisions of s. 4, sub-s. 1, with those of

s. 4, sub-s. 2. The appeal, therefore, must be allowed, and the case must go back to the justices with a direction that the offence charged is proved.

AVORY J. I am of the same opinion. I do not think there is any ground for saying that reg. 2, cl. 8, is ultra vires, particularly in view of the fact that it has been impliedly approved by both Houses of Parliament by being laid before them under the provisions of s. 9, sub-s. 2, of the Act of 1926. It is also clear that the justices dealt with this case as one where the lentils were weighed for sale within s. 4, sub-s. 1, whereas in fact, as my Lord has pointed out, they should have dealt with them as falling within s. 4, sub-s. 2, which deals with pre-packed articles. I agree, therefore, that the appeal should be allowed.

MACKINNON J. I agree. Sect. 4, sub-s. 2 (*b*), of the Act of 1926 deals in its first part with " minimum net weight," and in its second part with " minimum weight." The only intelligible interpretation of " minimum weight " in this sub-section is to say that it means minimum gross weight, that is the weight of the article with its wrapper. If that is right the Minister clearly had power to enact in the regulations that the weight to be indicated should be the gross weight, and the regulation is clearly intra vires.

Appeal allowed.

Solicitors for appellant : *Walmsley & Stansbury, for J. E. Dell & Loader, Shoreham.*

Solicitors for respondents : *Sharpe, Pritchard & Co.*

W. L. L. B.

1934
March 21, 27.

PIDDINGTON *v.* CO-OPERATIVE INSURANCE SOCIETY LIMITED.

Insurance—Motor car—Indemnity against liability " in respect of accidental injury to any person "—Exception when car " being used for other than private pleasure " or " conveying goods other than personal luggage "—Conveyance on car of laths to repair trellis work in insured's garden—Liability of insurers.

The words " personal luggage " in a policy of insurance in respect of a private motor car are not necessarily confined to the meaning given to them in cases relating to railway carrying rates or to liability to customs duties. In railway cases the words may have a narrower sense than they have in a policy of insurance against the risks of travel by motor car.

By a policy of insurance on a motor car, an insurance society undertook to indemnify the insured against liability in respect of accidental injury to any person, subject to exceptions (inter alia) (*a*) while the car was " being used for other than private pleasure," or (*b*) while it was " conveying goods other than personal luggage." The insured accidentally ran over and killed a man while he was driving the car at a time when there were fastened on the top of the car two laths with which the insured proposed to repair some trellis work in his garden:—

Held, that the word " pleasure " in the policy was used in contradistinction to " business " and the words " personal luggage " in contradistinction to " merchandise " ; that the insured's garden was his pleasure and not his business ; that the laths were personal luggage and not merchandise ; and that, therefore, the society were liable on the policy.

MOTION to set aside award.

By a policy of insurance in respect of a motor car, dated February 4, 1931, the respondents, the Co-operative Insurance Society Ld., undertook to indemnify the claimant, William Charles Piddington, his executors or administrators, for one year against "all sums . . . . which the insured shall become liable to pay and shall pay in respect of accidental injury to any person." This undertaking was subject to (inter alia) the following exception : " Loss, damage, and/or liability caused or arising while any motor car described in the schedule hereto is . . . . being used for other than private pleasure : . . . . or is conveying any load in excess of that for which it was constructed : or is conveying goods other than personal luggage : or whilst it is being driven in an unsafe or damaged condition."

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On October 17, 1931, the claimant, who was a designer employed by a firm of brassworkers, on finishing work at noon, drove home in his car (which was described in the schedule to the policy) on top of which were fastened lengthwise two laths, 12 or 14 feet long, with which he proposed to repair some trellis work in his garden. Between 2.30 and 3.30 P.M. on the same day he took his son with him for a pleasure run in the car from his home at Handsworth, near Birmingham, to Stirchley. The laths had not been removed from the car, and at some stage of the journey the claimant conceived the idea that the laths would serve to measure up certain brass work which his firm had been commissioned to do at a cinematograph theatre which was in course of construction at Stirchley. On arrival, however, he found that the work was not sufficiently advanced to permit of his doing any measuring and the laths were not removed from the car. At that time he had received no instructions from his employers about the work, but he knew that the contract for it had been placed with them two days previously. Returning from Stirchley to his home about 5.50 P.M., he knocked down and fatally injured a pedestrian. The laths did not in any way contribute to the accident.

The widow of the dead man having recovered 1000*l.* damages and obtained an order for 150*l.* taxed costs in an action against the claimant under Lord Campbell's Act, the respondent company refused to pay those sums to the claimant under the policy on the following grounds: (*a*) that the car was being used otherwise than "solely for private purposes" as set out in the proposal form and/or was being used for "other than private pleasure" as set out in the policy; (*b*) that the car was "conveying a load in excess of that for which it was constructed"; (*c*) that the car was "conveying goods other than personal luggage"; and (*d*) that the car was "being driven in an unsafe condition."

The dispute was referred to arbitration and the arbitrator ordered that the respondent company should pay to the claimant the 1150*l.* mentioned above, with 200*l.* for the claimant's own costs of the action and the costs of arbitration.

At the request of the respondent company he stated this case for the opinion of the Court whether he ought to have found in favour of the respondent company on any of the grounds specified. The respondent company also moved to set aside the award, and the matter was argued on that motion.

van den Berg K.C. and *Coley* for the insurance society.

Birkett K.C. and *John Wylie* for the assured.

Cur. adv. vult.

March 27. LAWRENCE J. read the following judgment: This is a motion to set aside an award made by an arbitrator on January 12, 1934, awarding to the claimant the amount which had been recovered against him in an action by the widow of a man whom he had killed in a motor accident.

The claimant was insured with the respondent society in respect of his motor car which was involved in the accident, but the respondent society repudiated liability on the following grounds: (1.) that the car was being used at the time of the accident for other than private pleasure purposes; (2.) that it was conveying a load in excess of that for which it was constructed; (3.) that it was conveying goods other than personal luggage, and (4.) that it was being driven in an unsafe condition. Grounds (2.) and (4.) were abandoned before me.

His Lordship stated the facts found by the arbitrator and continued: The two exceptions relied on are closely allied. It is said that the user of the car for the carriage of the laths in the circumstances was for other than a private pleasure purpose and also that the car was conveying goods other than personal luggage. In my judgment, the word "pleasure" is used in this policy in contradistinction to "business," and the words "personal luggage" in contradistinction to "merchandise," and the claimant's garden was his pleasure and not his business, and the laths were personal luggage and not merchandise. Any other construction seems to me to lead to the conclusion that the carriage of a packet of seeds, or a rosebush, or the various other articles which ordinary users of private motor cars habitually carry home for the adornment or use of their families, their homes or their gardens, would entail the use of the car for something which is not pleasure and would constitute the conveyance of "goods other than personal luggage" within the meaning of this policy.

But then it is argued that, even if this were so while the laths were being carried to the claimant's home, the user of the car in the afternoon was for the claimant's business and his intention to use the laths in measuring the brass work is further confirmation of this. I am unable to accept this contention. The claimant was merely going, so far as his visit to Stirchley was concerned, to look at a job he might have to do. He was not on a job which he had to do, and it is to be observed that the car was covered while the claimant was driving it to and from his place of business. The idea that crossed his mind of using the laths to measure the work did not, in my view, turn pleasure into business or the laths into goods, nor could it in any event affect the user of the car after the idea had been dismissed from his mind. As the accident happened on the journey home, even if the car had during part of its journey to Stirchley and while there been used for other than private pleasure, it was no longer being so used at the time of the accident, and the principle of *Provincial Insurance Co.* v. *Morgan* (1) would be applicable.

My attention was called to *Buckland* v. *The King* (2), where McCardie J. reviewed a number of cases in which words such as "baggage" and "personal luggage" had been construed by the Courts, but they were all cases in which the question was either whether a certain railway rate was applicable to the objects under consideration or whether they had to be entered or were dutiable under the Customs Acts.

In my judgment, the meaning which is to be attached to such words in a policy of insurance in respect of a private motor car is not necessarily the same as in those cases. A policy of insurance deals with risks, not rates; railway travel is not motor travel, and different considerations apply. It may be that in cases where a railway company affords two different facilities at different rates for carriage of goods by themselves and goods carried with a passenger the words "personal luggage" have a narrower sense than in a policy of insurance on a motor car against the risks of modern motor car travel.

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(1) [1933] A. C. 240.

(2) [1933] 1 K. B. 767.

For these reasons I reject the contentions of the insurance society and dismiss the motion.

Motion dismissed.

Solicitors for insurance society: *Freeland & Passey, Birmingham.*

Solicitors for claimant: *R. Evans Parr & Co., Birmingham.*

G. F. L. B.

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April 26, 27.

HAYNES *v.* HARWOOD.

[1933. H. No. 3021.]

Negligence—Plaintiff Police Constable stopping bolting Horses—Volenti non fit injuria—Risk in course of duty.

The plaintiff, a police constable, was on duty inside a police station in a frequented street. Seeing the defendants' runaway horses with a van coming down the street he rushed out and eventually stopped them, sustaining injury in consequence, for which he claimed damages. The defendants, whom the Court found guilty of negligence, contended that the maxim Volenti non fit injuria applied:—

Held, that as the defendants must have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life and limb, and also that the police were under a general duty to intervene to protect life and property, the act of and the injuries to the plaintiff were the natural and probable consequence of their negligence. The plaintiff did not within the true meaning of the maxim Volenti non fit injuria agree to take a risk knowing all the circumstances, but acted pursuant to his official duty.

Cutler v. *United Dairies* (*London*), *Ld.* [1933] 2 K. B. 297, distinguished.

ACTION tried by Finlay J.

The plaintiff, Thomas John Haynes, a Metropolitan police constable, claimed damages (agreed at 350*l.*) from the defendants, G. Harwood & Son, for personal injuries sustained by him as a result of the defendants' negligence.

On August 24, 1932, a two-horse van belonging to the defendants was left unattended by the driver in Paradise Street, Rotherhithe. For some reason the horses bolted along the street, which was frequented by many persons, including children, and other traffic. The plaintiff was in the police station in Paradise Street. He was on duty, but not on point duty. He looked out and saw the horses and van coming ; he rushed out, seized the reins and eventually stopped the horses, sustaining injuries in so doing. The defendants denied negligence, and said that the plaintiff had voluntarily undertaken the risk of injury, and that they would rely on the maxim Volenti non fit injuria. They also alleged contributory negligence, and relied on the doctrine of common employment.

An executive officer from Scotland Yard gave evidence that the orders of the Metropolitan police provided that all the efforts of a police constable must be directed to the preservation of life and property, but that they contained no express provision that it was his duty to try to stop a runaway horse.

Hilbery K.C. and *N. R. Fox-Andrews* for the plaintiff. The plaintiff is entitled to succeed. Through their servant the defendants were guilty of negligence. Their duty was to use reasonable care to avoid injuring those using the highway : *Hambrook* v. *Stokes Bros.* (1) There was a complete breach of that duty when their servant left the horses unattended, and the cause of action was complete when, in consequence, the plaintiff was injured. The bolting of the horses was prima facie evidence of negligence : *Gayler & Pope, Ld.* v. *B. Davies & Son, Ld.* (2), and the defendants have not discharged the onus of disproving negligence thus thrown on them.

[*Martin* v. *Stanborough* (3) ; *Lynch* v. *Nurdin* (4) ; and *Cooke* v. *Midland Great Western Ry. of Ireland* (5) were also referred to.]

(1) [1925] 1 K. B. 141, 156.
(2) [1924] 2 K. B. 75.
(3) (1924) 41 Times L. R. 1.
(4) (1841) 1 Q. B. 29.
(5) [1909] A. C. 229, 237.

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The doctrine Volenti non fit injuria does not apply. The plaintiff may seem to have voluntarily taken the risk. But he had no choice. In the performance of his duty as a policeman he had to act and did act at once, without a moment's hesitation. And another duty would also be operating on his mind—namely, the moral and social duty to protect life. Lord Young in *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (1), where a boy was injured while endeavouring to save a friend from injury, said that the boy was under a duty, though not a legal duty, to interfere to save the life or limbs of another. In the New York case of *Wagner* v. *International Ry. Co.* (2) Cardozo J. said : "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim ; it is a wrong also to his rescuer." The initial act was the negligence of the defendants ; one of the links of causation was that some one would thereby be put in danger and that some one else might react to the impulse to rescue. This case is distinguishable from *Cutler* v. *United Dairies (London), Ld.* (3), inasmuch as there was not in the present case as there was in that case time for deliberation which constituted the act of the plaintiff a novus actus interveniens. And Slesser L.J. in that case (4) distinguishes it from a case where a man sees his child in great peril in the street, and, moved by paternal affection, dashes out and holds a runaway horse, and is injured.

[*Donoghue* v. *Stevenson* (5); *Hollaran* v. *City of New York* (6); *Devine* v. *Pfaelzer* (7) ; *Brandon* v. *Osborne Garrett & Co.* (8) ; *Yarmouth* v. *France* (9); and an article "Rescue and Voluntary Assumption of Risk " in the Cambridge Law Journal, vol. v., p. 192, by Prof. Goodhart, were also referred to.]

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(1) (1897) 24 R. 1001, 1005.
(2) (1921) 232 N. Y. 176, 180.
(3) [1933] 2 K. B. 297.
(4) Ibid. 306.
(5) [1932] A. C. 562, 580.
(6) (1915) 153 N. Y. S. 447.
(7) (1917) 277 Ill. 255 ; 115 N. E. 126.
(8) [1924] 1 K. B. 548.
(9) (1887) 19 Q. B. D. 647.

Rowland Thomas K.C. and *G. J. Paull* for the defendants. There was no evidence of negligence. But even if the defendants were guilty of negligence, it was not the cause of the plaintiff's injuries; the cause was the voluntary act of the plaintiff in stopping the horses. Though there be a general duty on the part of the police to protect life and property there is no specific duty to try to stop a runaway horse, and the plaintiff would not have suffered official penalties had he failed to make the attempt. He was not on duty regulating traffic. As a police officer he would be familiar with incidents like this and cannot be heard to say that in attempting to stop the horses he had to act precipitately and had no time to think. His act constituted a novus actus interveniens. If he was under a duty to attempt to stop runaway horses then he always knew that he was bound to do so, and the principle of the maxim Volenti non fit injuria must apply. *Cutler* v. *United Dairies* (*London*), *Ld.* (1), governs this case. In *Brandon* v. *Osborne Garrett & Co.* (2) the defence of Volenti non fit injuria was not raised, and in *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (3) three of the seven judges dissented.

[Beven on Negligence, 4th ed., vol. i., p. 174, was also referred to.]

FINLAY J. The action is both interesting and rather important. It is an action for damages for personal injuries, and it is brought by the plaintiff, a police constable in the Metropolitan police force stationed at Rotherhithe, against the defendants, who are the owners of a two-horse van. The substance of the case for the plaintiff is that by reason of the negligence of the servant of the defendants the horses ran away and bolted down a street, called Paradise Street, and that the plaintiff, rushing out of a police station on that route, seized the horses' heads and succeeded in stopping them, but was injured in doing so. In those circumstances the plaintiff says that he has suffered injuries caused by the negligence

(1) [1933] 2 K. B. 297.
(2) [1924] 1 K. B. 548.
(3) 24 R. 1001.

of the defendants. The defendants raise several defences: they deny that there was any negligence on their part; they say—and this is the matter upon which the main part of the argument in the case has turned—that the plaintiff in attempting to stop the horses voluntarily undertook the risk of any injury which might occur to him; they also say that the plaintiff was guilty of contributory negligence, and they further set up the doctrine of common employment.

In my opinion the plaintiff is entitled to succeed. The two main matters which have to be considered are these. In the first place, was the defendants' servant guilty of negligence? and in the second place, is the plaintiff, even if there was some negligence of the defendants' servant, precluded from recovering by reason of the application of the doctrine of Volenti non fit injuria? I will deal first with the question which naturally comes first: Was there negligence? These were, I think, quite reliable horses, and the defendants' driver had driven them for a long time and knew them well. I see no reason to suppose that they were in any way, or to any serious extent, vicious horses. What happened on the afternoon in question was that the defendants' van-man was delivering at a place called Quiney's Yard. The van with its two horses came out of the yard and the van stood with the horses facing towards the police station. The defendants' driver then left them and went back to get a receipt, an operation which he told me would take about three minutes. In that interval the horses bolted.

The law with regard to matters of this sort is laid down in a passage to which my attention has been called in the speech of Lord Atkinson in the case of *Cooke* v. *Midland Great Western Ry. of Ireland* (1), where he says: "The authorities from *Lynch* v. *Nurdin* (2) downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may

(1) [1909] A. C. 229, 237.

(2) 1 Q. B. 29.

not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions." I do not doubt that where you have a pair of horses and a van left unattended in the street and the horses run away, that raises a presumption of negligence. It may be rebutted, but it casts an onus upon the owners of the horses and van to show that what happened happened without negligence.

[His Lordship then discussed the evidence, and continued:] In my opinion the defendants here have failed to discharge that onus. On that part of the case, therefore, I am in favour of the plaintiff.

That brings me to the matter which has been mainly argued. It is convenient before I come to that matter to complete in a very few words the necessary statement of the facts. The horses ran away down this street. Some way down the street there is a police station. In the charge-room, a room facing to the street, the plaintiff was on duty; he heard a disturbance, and went to the window, and he then saw the pair of horses some little distance down the street bolting towards him; he instantly ran out and right across the street, seized a woman who was in actual peril because she was crossing the street, threw or pushed her to a place of safety, seized the off-side horse, and succeeded in bringing the horses to a standstill, suffering himself substantial injuries in doing so.

I may perhaps refer, merely to dispose of them, to two contentions which were raised. It was suggested that the plaintiff was guilty of contributory negligence. Little if any argument has been addressed to me upon that point, and I am quite unable to see that there was any negligence on his part. I see no reason to doubt that in a serious emergency he did the very best that could be done. It is also pleaded that the police officer became the servant of the defendants, so as to render applicable the doctrine of common employment. There appear to me to be no facts to lay the necessary foundation for that contention. There is no suggestion that any servant of the defendants in any way asked the aid of the plaintiff, and that point does not appear to me to arise.

I proceed to consider what I conceive to be the real point, and a difficult point, that is the application of the doctrine of Volenti non fit injuria. I do not think it is necessary or would be useful that I should attempt any review of the long series of cases in which that doctrine has been explained. Reference has constantly been made to the very well known judgment of Bowen L.J. in *Thomas* v. *Quartermaine* (1), where the learned Lord Justice points out that the word is volenti and not scienti. I do not propose to re-state a doctrine which is so perfectly well established and has been discussed in so many cases, although I might perhaps just refer to what Lord Halsbury said in the case of *Smith* v. *Baker & Sons* (2): "The jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."

The way the defendants have put their case is this. They say that the plaintiff by his own voluntary act brought the risk upon himself; he chose to take the risk, therefore what happened was caused, not by any antecedent negligence of the defendants, but by the act of the plaintiff himself. My attention was called to a rather interesting decision upon this matter, a decision of four out of seven judges in the Court of Session in Scotland. I do not need to refer to the case in detail; it was the case of *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (3) Without referring further to that case I

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(1) (1887) 18 Q. B. D. 685, 696. (2) [1891] A. C. 325, 338.
(3) 24 R. 1001, 1005.

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might call attention to the judgment of Lord Young in which he defines the duty which may exist in such cases, and says that the duty may be not only the duty of a legal obligation but also what may be considered to be a moral duty, a duty to preserve life and limb. There are, I think, two fairly recent cases in the English Courts in which these matters have been considered and discussed. The general principle is that if a person is guilty of negligence then he is responsible for all the consequences of that negligence. My attention was called to a passage in a very recent authority, the case of *Donoghue* v. *Stevenson* (1), where Lord Atkin says: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be —persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." That passage is, I think, important, and from this point of view: The defendants are responsible for the consequences of their negligence, those consequences which actually flow from it. *In re Polemis and Furness Withy & Co.* (2) is the case which is usually cited for that proposition. One has to consider whether this was a consequence of the defendants' negligence. It seems to me that if horses run away it must be quite obviously contemplated that people are likely to be knocked down. It must also, I think, be contemplated that persons will attempt to stop the horses and try to prevent injury to life or limb. A passage was cited to me from the judgment of a very well known American judge, Cardozo J., in *Wagner* v. *International Ry. Co.* (3), in which reference is made to the circumstance that one must have regard not only to the victim but also to the rescuer. It seems to me that it is true to say that if horses run away

(1) [1932] A. C. 562, 580.
(2) [1921] 3 K. B. 560.
(3) 232 N. Y. 176, 180.

then there is a likelihood of injury ; also there is a likelihood that in the emergency persons will obey that natural instinct which induces them, if they can, to prevent injury to life. The matter is expressed in a passage from Sir Frederick Pollock's Law of Torts, 13th ed., p. 498, where he says : "The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue."

There are two recent authorities in which this matter has been discussed. One is a decision of Swift J. in the case of *Brandon* v. *Osborne Garrett & Co.* (1), which was a case where by the negligence of some contractors glass poured down into a shop. The plaintiff, a lady, sprang forward to help her husband who suddenly had glass showered upon him, and in doing so she injured herself. Swift J., after hearing a very full argument, held that she was entitled to recover. He said (2) : "No danger, it is said, was threatening her. If she had been trying to escape from danger threatening herself it is not disputed that she would have been entitled to recover, but it is said that what brought about her injury was her own voluntary act in trying to assist her husband, whom she believed to be in danger. I have come to the conclusion that she is entitled to damages, notwithstanding that the injury was caused by her own intervention to save her husband, unless, indeed, it can be shown that her act amounted to contributory negligence. In such circumstances as these it would be for the jury to say whether, where the primary cause of the injury was the negligence of the defendants in breaking the glass roof so that portions of it fell on the male plaintiff and close to her, the injury to her leg was caused by an improper act of hers which contributed to the mischief. If she did something which a reasonable person in the circumstances ought not to have done she would not be entitled to damages, but if what she did was done instinctively and was in the circumstances a natural and proper thing to do, I think she is entitled to recover." Swift J. discusses several of the cases, including particularly the American case of *Eckert* v. *Long Island Railroad Co.* (1), and he sums up the matter in this way (2): "Without, however, determining these questions, it seems to me that where a person sustains injury through a combination of acts, some done by the defendants and some by himself, it is for the jury to say, having regard to the whole of the circumstances, whether (1.) the injury is the natural and probable consequence of the defendants' act, and (2.) whether the plaintiff has been guilty of contributory negligence." Following the decision of Swift J. I should answer both those questions in the plaintiff's favour. I think that the injury was the natural and probable consequence of the defendants' act; and I think there is no material at all for saying that the plaintiff was guilty of contributory negligence.

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(1) [1924] 1 K. B. 548.

(2) Ibid. 551.

"The natural and probable consequence of the defendants' act"—that, of course, raises a question of difficulty, and it leads me to consider the last case I need refer to, a case which undoubtedly has caused me considerable difficulty and anxiety: that is the recent decision of the Court of Appeal, reversing a decision of Horridge J. sitting with a jury, in the case of *Cutler* v. *United Dairies* (*London*), *Ld.* (3) It is hardly necessary for me to say that if I thought that that case covered the present case I should, without a moment's hesitation, follow it; but I think that when it is examined it does not cover the present case. In that case there was a horse running away, but the horse had come to rest in a field; although the man in charge appears to have been agitated, nobody was in any danger; the plaintiff, in response to a cry of "Help, help" from the man, jumped over the hedge, went into the field and endeavoured to hold the horse, and was injured in so doing. In those circumstances it was held by the Court of Appeal that the verdict of the jury which had been in favour of the plaintiff could not stand.

It is perhaps convenient, before I deal with the leading judgment, which was that of Scrutton L.J., to refer to what

(1) (1871) 43 N. Y. 502; 3 Am. Rep. 721.

(2) [1924] 1 K. B. 555.

(3) [1933] 2 K. B. 297.

was said by Slesser L.J. He says (1): "With the evidence as we have it, it seems plain that the essential cause of the accident—the causa causans—was the act of the respondent himself in acceding to the request to hold the horse's head, that and nothing else. There may be cases, where, for example, a man sees his child in great peril in the street and, moved by paternal affection, dashes out and holds a runaway horse's head in order to save his child, and is injured; there there is no novus actus interveniens. Certainly a man is entitled, in order to save himself, to attempt to arrest a runaway horse. But in the present case the respondent of his own motion gets over a hedge in response to the words 'Help, help!' and imperils his life or limbs by trying to hold the horse." I observe that there is a note, signed with the not unfamiliar initials F. P., to the passage I have just been reading, where attention is called to the case of *Brandon* v. *Osborne Garrett & Co.* (2) and the New York case, *Eckert* v. *Long Island Ry. Co.* (3) That passage seems to me to make it clear that Slesser L.J. would have been of opinion, in the case of a man, who seeing his child in peril in the street dashes out, that there there would be no novus actus interveniens. No novus actus interveniens, I suppose, because the man was acting in pursuance of a duty; because it is the sort of thing that must be expected; because people do act in accordance with their duty, duty not only legal but also moral and social; and because, therefore, a wrong-doer cannot be heard to say that a man is the author of his own misfortune because, acting in pursuance of a moral duty, he attempts to deal with the situation created by the wrong.

Having read that passage from the judgment of Slesser L.J. I now come to look at the judgment of Scrutton L.J. What he says is this (4): "I start with this: A horse bolts along a highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it seems to me that he is not. The damage is the result of the accident. The man who was injured, in running out to stop the horse, must be presumed to know the ordinary consequences of his action, and the ordinary and natural consequence of a man trying to stop a runaway horse is that he may be knocked down and injured. A man is under no duty to run out and stop another person's horse, and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse. This is sometimes put on the legal maxim volenti non fit injuria; sometimes it is put that a new cause has intervened between the original liability, if any, of the owner of the horse which has run away. That new cause is the action of the injured person, and that new cause intervening prevents liability attaching to the owner of the horse." It is, of course, necessary to see how that passage fits in with the passage from the judgment of Slesser L.J. which I read a few moments ago. I think that the passage in the judgment of Scrutton L.J. has reference to the facts with which he was there dealing; facts in which there was no duty to intervene, facts in which there was no danger to be apprehended to life, facts remote from those in such a case as the present, where there was a crowded street and a woman in actual danger. It will be observed that Scrutton L.J. expressly puts it that there is no duty to run out. It is not easy, or perhaps it is impossible, to define exactly those cases in which there is such a moral and social duty. The case before the learned Lords Justices is an example of a case where there was no such duty; the illustration put in that very judgment by Slesser L.J. is an example of a case where there was such a duty.

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(1) [1933] 2 K. B. 305.

(2) [1924] 1 K. B. 548.

(3) (1871) 43 N. Y. 502; 3 Am. Rep. 721.

(4) [1933] 2 K. B. 303.

Applying that to the present case, what is the position? The plaintiff is a policeman: I do attach some weight to that fact. If he were a policeman on point duty I should have thought the case was reasonably clear; I should have thought that there was a perfectly plain duty on a policeman on point duty to regulate traffic and a duty, if he can, to stop runaway horses. Here it is true that the duty was perhaps less clear because this policeman was not at the time actually controlling the traffic; but, being on duty in a room looking out on to the road, he, owing, as I do not doubt all the police owe, a general duty to the public to preserve life and property, sees horses running away, and it seems to me that in those circumstances he does owe a duty to intervene. I think he does not, within the true meaning of the doctrine, agree to take a risk knowing all the circumstances; what he does is that he acts pursuant to a higher duty, and in so acting he does, incidentally of course, incur the risk. The plaintiff did a very brave thing, for which he has very deservedly been rewarded; I think that when he did that brave thing he was acting in pursuance of a public duty. It is perhaps better to deal with the exact case which one has before one, and the exact case which I have before me is a case of a policeman who sees runaway horses and persons in actual peril; it is not the same as the illustration put by Slesser L.J., although perhaps it is not so very far away from it.

In those circumstances I have arrived at the conclusion that *Cutler* v. *United Dairies* (*London*), *Ld.* (1), is, on the facts and on the principles there laid down, distinguishable from the present case, and that on the facts of the present case the doctrine of Volenti non fit injuria has no application; or, to use other Latin words which have been much used, there was no novus actus interveniens. I think the responsibility rests upon the defendants, and for those reasons I am of opinion that the plaintiff is entitled to succeed.

Solicitors for plaintiff: *Ponsford & Devenish.*
Solicitors for defendants: *William Hurd & Son.*

(1) [1933] 2 K. B. 297.

W. L. L. B.

WEST HAM CORPORATION *v.* CHARLES BENABO AND SONS.

1934
March 22,
26, 28.

[1933. W. 4110.]

Housing—Notice to render dwelling-houses fit for habitation—Default—Work done by Local Authority—Demand for payment—No Demand in respect of each separate house—Demand not signed by Town Clerk—Failure of defendants to appeal to County Court—Housing Act, 1925 (15 *Geo.* 5, *c.* 14), *s.* 120, *sub-s.* 2—*Housing Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *s.* 17, *sub-ss.* 1, 2, 3 ; *s.* 18 ; *s.* 22, *sub-s.* 1 ; *s.* 65, *sub-s.* 1.

On the default of the defendants to render fit for human habitation two blocks of houses, numbering twenty-three houses altogether, which were under their control, after proper notices served on them, the plaintiff corporation, under s. 18, sub-s. 1, of the Housing Act, 1930, did the work themselves, and served a demand for payment on the defendants under s. 18, sub-s. 3, of the Housing Act, 1930. The claim was signed by one of the plaintiffs' officials, not the town clerk. It claimed two sums, one in respect of each block of houses, giving the totals of the different items of expenditure, labour and materials, but there was no demand for the expenditure on each or any house separately. On these demands being made the defendants did not appeal to the county court under s. 22, sub-s. 1 (*b*), of the Act of 1930 :—

Held, that the demands were bad, firstly, in that they were not signed by the town clerk as directed by s. 120, sub-s. 2, of the Housing Act, 1925, which by s. 65, sub-s. 1, of the Act of 1930 is to be construed as one with the latter Act ; and secondly, because they did not specify the sums spent on each separate house.

Held, further, that the fact that the defendants did not appeal to the county court did not make the demands good demands, and that "demand" in s. 22, sub-s. 1 (*b*), of the Act of 1930 meant a valid demand. The defendants, therefore, were not bound to appeal to the county court.

ACTION tried before Atkinson J.

The plaintiffs, the West Ham Corporation, claimed from the defendants, Charles Benabo & Sons, payment of a sum of 165*l.* 3*s.* 6*d.* The following facts are taken substantially from the judgment of Atkinson J.

The claim concerned two lots of houses, Nos. 1 to 9 Wade Road, and Nos. 174 to 188 Grange Road. These houses, in the opinion of the local authority, were not fit for habitation, and on October 22 and December 17, 1931, notices were served under s. 17 of the Housing Act, 1930 (1), on the defendants, who were in control, in respect of each of the above houses. There was a separate notice for each house, and each notice indicated with sufficient detail the work that, in the opinion of the corporation, was required to be done to render the house fit for habitation. All these notices were signed by the town clerk. Some work was in consequence

(1) Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 17: "(1.) Where a local authority . . . . are satisfied that any dwelling-house . . . . is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon such person as is hereinafter mentioned a notice requiring him . . . . to execute the works specified in the notice . . . ."

Sub-s. 2: "A notice under this section shall be served upon the person who receives the rack rent of the house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack rent, and that person is in this Part of this Act referred to as the person having control of the house."

Sub-s. 3: "In addition to serving a notice under this section on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in the house, whether as freeholder, mortgagee, lessee, or otherwise."

Sect. 18: "(1.) If a notice under the last preceding section requiring the person having control of a dwelling-house to execute works is not complied with, then, after the expiration of the time specified in the notice or, if an appeal has been made against the notice and upon that appeal the notice has been confirmed . . . . after the expiration of twenty-one days from the final determination of the appeal . . . . the local authority may themselves do the work . . . ."

Sub-s. 3: "Any expenses incurred by the local authority under this section, together with interest . . . . from the date when a demand for the expenses is served until payment, may, subject as hereinafter provided, be recovered by them, by action or summarily as a civil debt, from the person having control of the dwelling-house or, if he receives the rent of the house as agent or trustee for some other person, then either from him or from that other person, or in part from him and as to the remainder from that other person: Provided that if the person having control of the dwelling-house proves that he—(i.) is receiving the rent merely as agent or trustee for some other person; and (ii.) has not, and since the date of the service on him of the demand has not had, in his hands on behalf of that other person sufficient money to discharge the whole demand of the authority, his liability shall be limited to the total amount of the money which he has, or has had, in his hands as aforesaid."

Sub-s. 4: "In all summary proceedings by the local authority for the recovery of any such expenses, the time within which the proceedings may be taken shall be reckoned from the date of the service of the demand or, if an appeal is made against that demand, from the date on which the demand becomes operative."

carried out by the defendants, but the corporation was not satisfied, and on July 11 and 21, 1932, notices were served on the defendants indicating that the corporation intended to enter on the premises and execute the necessary work. Again there was a separate notice for each house, signed by the town clerk. Work was done by the corporation on the houses, and on January 23, 1933, the borough engineer wrote a letter to the defendants. It came from the "Borough Treasurer's Department, Municipal Offices." It was headed: "Re Housing Act, 1930, sections 17 and 18: re 1 to 9 Wade Road and 174 to 188 Grange Road," and continued: "In reply to your letter of the 11th inst., I have pleasure to enclose details of accounts as rendered by the contractors to this corporation in respect of the above . . . . Yours faithfully (signed) E. J. Johnson." There was nothing further to indicate who E. J. Johnson was. Enclosed with the letter were two statements, one referring to Wade Road "To cost of work carried out at the above property, as per details herewith, 96*l.* 7*s.* 1*d.*," and the other in respect of Grange Road in similar terms for 68*l.* 16*s.* 5*d.* Then there were two documents headed "Details of account rendered (Housing Act, 1930, s. 18). Work executed at 1 to 9 Wade Road." Then followed details, not of the work done or the amount charged in respect of each house, but giving the total expenditure for, e.g., wages (bricklayers, slaters, etc.) so much, and material (stocks, slates, cement, airbricks, etc.) so much. A similar document related to Grange Road.

Sub-s. 5: "The local authority may by order declare any such expenses to be payable by weekly or other instalments . . . . from the date of the service of the demand . . . . and any such instalments . . . . may be recovered summarily as a civil debt from any owner or occupier of the dwelling-house, and, if recovered from an occupier, may be deducted by him from the rent of the house."

Sub-s. 6 makes the amount of such expenses due to the local authority a charge on the premises in respect of which the expenses were incurred.

Sect. 22: "(1.) Any person aggrieved by . . . . (*b*) a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice; (*c*) an order made by a local authority with respect to any such expenses; . . . . may, within twenty-one days after the date of the service of the . . . . demand or order . . . . as the case may be, appeal to the county court . . . ."

1934

WEST HAM CORPORATION v. CHARLES BENABO & SONS.

After further correspondence a letter was written by the town clerk dated July 17, 1933, drawing attention to the defendants' failure to pay, and requesting payment. The defendants did not pay and the writ was issued.

The defendants contended that the demand for payment did not come, as it should, signed by the town clerk; and that the demand, under the Act, must be in respect of each particular house and have reference to a particular notice.

The plaintiffs, while contesting these points, said the defendants, not having appealed to the county court under s. 22, sub-s. 1 (*b*), of the Act of 1930, were bound by the demands.

S. Edgar Macassey for the plaintiffs.
Phineas Quass for the defendants.

ATKINSON J. In this case the Mayor, Aldermen and Burgesses of the county borough of West Ham are suing Messrs. Charles Benabo & Sons for 165*l.* 3*s.* 6*d.* expenses incurred by them in executing certain works of repair on dwelling-houses in the control of the defendants under their powers contained in the Housing Acts. The claim concerns two lots of houses, Nos. 1 to 9 Wade Road, and Nos. 174 to 188 Grange Road. These houses, in the opinion of the local authority, were not fit for habitation, and on October 22 and December 17, 1931, notices were served under s. 17 of the Housing Act, 1930, in respect of each of these houses. There was a separate notice for each house, and each notice indicated with sufficient detail the work that in the opinion of the corporation was required to be done to render the house fit for habitation. All these notices were formal notices on printed forms, as supplied by the Minister, and they were all signed by the town clerk. They came from the Town Hall, West Ham, and nobody receiving those notices could have any doubt whatever that they were receiving formal notices under s. 17 of the Act. I am told that the defendants carried out a lot of work, and that in their view they complied sufficiently with the notices. However that may be, the local authority was not satisfied, and on July 11, 1932, as to Grange Road, and on July 21 as to Wade Road, notices were served indicating that the corporation intended to enter upon the premises and execute the work required. Again there was a separate notice for each house, the form was a printed form signed by the clerk of the above-named local authority, and again was a formal notice, given in pursuance of the powers under the Act. Following on those notices the local authority instructed certain contractors to go and do some work, and some work having been done, the borough engineer on January 23, 1933, wrote a letter to the defendants which came from the borough treasurer's department, Municipal Offices, The Grove, Stratford. It was headed "Re Housing Act, 1930, sections 17 and 18, re 1 to 9 Wade Road and 174 to 188 Grange Road," and it read: "In reply to your letter of the 11th inst., I have the pleasure to enclose details of accounts as rendered by the contractors to this corporation in respect of the above . . . . Yours faithfully, (Signed) E. J. Johnson." There was nothing to indicate who E. J. Johnson was, except that he probably had something to do with the borough treasurer's department. Enclosed with the letter were two statements, one referring to Nos. 1 to 9 Wade Road, "To cost of work carried out at the above property, as per details herewith, 96*l.* 7*s.* 1*d.* Notice served 22nd October, 1931," and a similar statement in respect of Grange Road for 68*l.* 16*s.* 5*d.*, notice served 17th December, 1931. Then there were two documents headed "Details of account rendered (Housing Act, 1930, section 18). Work executed at 1 to 9 Wade Road, Custom House, E.16," and then followed details, not stating the work done or the amount charged in respect of each house, but saying, to illustrate what is in the document, under the first heading, "Wages. Labourer, 237 hours at 1*s.* 2¾*d.*," so much; "Bricklayer, 141 hours at 1*s.* 7½*d.*," so much; "Slater, 109 hours at 1*s.* 7½*d.*," and so on. Then "Material (stocks, slates, cement, airbricks)" so much; and a similar account related to Grange Road. The correspondence shows that the defendants had been pressing for details, but not of that kind, because those two accounts told them what any person of intelligence would know already, that an account would consist of time, wages and material. What they wanted to know was how much had been spent on each house, and these accounts failed to give any indication of how the expenses claimed were to be apportioned over the houses. Those demands were acknowledged by the defendants by letter which asked for the cost, nature and extent of the repairs alleged to have been carried out. The defendants believed they had done all the work they had been called upon to do, and they wanted to know what was the work done with regard to each house. The only answer they got was a second application signed by Mr. E. J. Johnson saying that they had not had payment of the accounts and asking for the amount to be remitted. The defendants kept pressing for further information and did not pay, and finally there came a letter signed by Mr. Charles E. Cranfield, the town clerk. This letter, dated July 17, 1933, came from the Town Hall, West Ham, and it was headed "Account outstanding—173*l.* 8*s.* 0*d.*," and read "The borough treasurer informs me that you have failed to pay the sum of 173*l.* 8*s.* 0*d.* in respect of drainage work at 73, Croydon Road, E.13, 8*l.* 4*s.* 6*d.*, work at 174–188 Grange Road, E.13, 68*l.* 16*s.* 5*d.*, work at 1–9, Wade Road, E.16, 96*l.* 7*s.* 1*d.*, total 173*l.* 8*s.* 0*d.* I must therefore request you to forward the same to me on or before the 31st instant, failing which instructions will be given for proceedings to be taken against you for the recovery thereof. I am, dear Sirs, Yours faithfully, (Signed) Charles E. Cranfield." This letter again was not on the printed form, and was of a totally different character from the four different sets of notices which had been served, which had all been formal documents served in pursuance of statutory requirements; but I dare say that the defendants would remember that Mr. Cranfield was in fact the town clerk.

The defendants did not pay, and ultimately this writ was issued. The writ, which contains the statement of claim, was originally based only on the demand served on January 23, 1933, but at the hearing, after it had been pointed out that by s. 65, sub-s. 1, of the Housing Act, 1930, that Act had to be construed as one with the principal Act of 1925, and that the principal Act contained a provision (s. 120, sub-s. 2) that all notices and demands within the Act had to be signed by the clerk or deputy clerk, the plaintiffs applied for leave to amend, and the claim was amended by pleading alternatively the demand served on July 17, 1933, that is by pleading the letter that I have just read, which was in fact signed by the clerk to the borough council.

Various preliminary points have been raised by the defendants. In substance they are as follows. They say that there is no legal liability until a demand has been made, and that there has been no demand in this case. They contend, firstly, that a demand to be in accordance with the Housing Acts must come from the proper quarter, in other words must be signed by the clerk or deputy clerk; and, secondly, that a demand to be valid must be a demand in respect of each particular house and have reference to a particular notice, and they say that neither of these demands complied with that requirement. The first demand clearly did not comply with the requirement as to signature. They then say that a demand ought to indicate the work that has been done so that a defendant, an owner, can have some chance of determining whether the claim is a fair and proper one. On the other hand, the plaintiffs, while challenging all these points, say that there is a method provided, namely, by appeal to the county court under s. 22, sub-s. 1 (*b*), of the Act of 1930, for determining any objection that the defendants may have, and that if that method is not adopted they become bound by the demands. The plaintiffs, therefore, claim that it is now too late for the defendants to raise any objection and say that they are entitled to judgment for the amount claimed and that the defendants cannot now challenge the justice or accuracy of the amount claimed. Having drawn attention to the relevant sections I will deal with these points later.

The relevant provisions are those in ss. 17, 18 and 22 of the Act of 1930. (1) I am not going to read them, but under s. 17 if a local authority is of opinion that repairs are necessary to make a house fit for human habitation they can serve a notice specifying the work to be done and call upon the owner or the person in control to do it. Sub-s. 3 provides that in addition to serving a notice on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in that house whether as freeholder, mortgagee, lessee or otherwise. All through this section it is clear that a dwelling-house is referred to, and it seems to me to contemplate dwelling-houses being dealt with separately and individually. Sect. 18, sub-s. 1, again referring to a dwelling-house, provides what is to be done if the person called upon to do the work does not do it. He has to be served with a notice, and if the notice is not complied with the local authority will do the work themselves. Then sub-s. 3 goes on to provide [His Lordship read the sub-section.] (1) Sub-section 4 says: [His Lordship read it.] (1) Then passing to s. 22, sub-s. 1 (*b*) [His Lordship read it.] (1) Later on there is a provision (sub-s. 2 (i)) that the judge may make an order confirming or quashing or varying the demand, and sub-s. 5 provides that " Any notice, demand or order against which an appeal might be brought to a county court under this section shall, if no such appeal is brought, become operative on the expiration of the period of twenty-one days mentioned in sub-section 1 of this section (1), and shall be final and conclusive as to any matters which could have been raised on such an appeal."

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(1) Ante, p. 254, Note (1).

I am satisfied that there is no enforceable claim until a demand is made. I think that is implied throughout these sections, and it is not very strenuously contested that it is. There cannot be default in law in not paying a sum of the amount of which you are completely ignorant and which you never have been asked to pay. Two cases were cited which were not decided on these provisions, but on analogous sections. The first is *Labalmondiere* v. *Addison* (2), where it was held that the matter of complaint really was the non-compliance with a demand and the period of limitation only

(1) Ante, p. 254, Note (1). (2) (1858) 28 L. J. (M. C.) 25; 1 El. & El. 41.

ran from the demand. Lord Campbell said: (1) "It seems contrary to all reason to say, that there was any liability or default in the respondent before application had been made to him, stating what the amount of expenses were and demanding payment, although a demand is not expressly required by the statute." Here also no demand is expressly required by the statute. Wightman J. said (1): "The default of the respondent alleged in the summons is, the non-payment of the amount of expenses after having been applied to for them." Then there is the case of *Grece* v. *Hunt* (2) which dealt with certain sewering and paving expenses. There the work had been executed for the improvement of a street under two totally different statutes, and the expenses were charged upon the owners of the premises fronting the street. It was held—I am quoting from the headnote—that it was necessary "before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him," and the statutory period of six months did not begin to run until that had been done. I think every word of the reasoning in the judgment in that case applies to this case, and that there is no legal liability until a demand has been served.

Now logically I think it must follow that if liability under the statute is created by a demand, the demand must be a proper demand, that is, one that complies with the statutory requirements. It is not so easy to determine what are essential requirements, but I have no doubt, at any rate, as to two of them. I am satisfied that a demand must come from the proper quarter; that means that it must be signed by the clerk or his deputy. There seem to me to be very good reasons why that express statutory provision should be adhered to. The local authority under s. 18, sub-s. 5, has power to declare the expenses payable by instalments, and it must be their duty at some time to address their minds to that question. If the notice comes from their recognized agent, the town clerk, a recipient must be bound to assume

(1) 28 L. J. (M. C.) 27. (2) (1877) 2 Q. B. D. 389.

that the demand is made with authority, and that the conditions of payment have been considered by the local authority, and that he is under an obligation to obey the demand. But if it comes from any one else there is no reason why he should be bound to make such an assumption. The demand may have been made on the writer's own initiative without any instructions from the corporation, without the corporation having considered the terms of payment at all, and if once one departs from the provision that the demand must be signed by the clerk or the deputy, where is one to draw the line? It seems to me that one would get into all sorts of difficulties if one took the view that it was not an essential part of the statutory demand that it should come from the proper quarter and be signed by the clerk or his deputy. That rules out the first notice signed by Mr. Johnson.

The second requirement, as to which I have no doubt, is that a demand must be a demand for a definite sum alleged to have been spent on a particular house. I do not, of course, mean that there is to be a separate document for each house, but that the demand must be in respect of the expenses alleged to have been incurred on each house. I think ss. 17 and 18 of the Act of 1930 indicate this again and again, but there are three matters in particular which seem to me to put this question beyond doubt. The first one is the proviso to s. 18, sub-s. 3 (1), which limits the liability of the person having control of the dwelling-house, if he is an agent or trustee, to the amount which he has in his hands. That seems to me to be contemplating his position in regard to each particular house. He may be receiving the rent of one house for one person, the rent of another for another person, and may have varying sums of rent in his hands, because the amount of rent may be different and the amount of expenses may be different. I cannot see how that section can apply at all unless he knows exactly how much is claimed in respect of each house. Then there is sub-s. 6 which creates the charge: "The amount of any expenses and interest thereon due to a local authority under this section shall be a charge on the premises in respect of which the expenses were incurred." It is obvious that if an omnibus demand is made for a lump sum having reference to any number of houses, that section is wholly inoperative, because the charge on each house is not in respect of the expenses incurred on a number of houses, but in respect of the expenses incurred on that particular house, and as the charge cannot be effective until there is a legal liability to pay, and as that legal liability is to start with demand, it seems to me it was contemplated beyond all question that the statutory demand must be in respect of each particular house. The third matter which seems to me decisive is s. 22, sub-s. 1: "Any person aggrieved by . . . . (*b*) a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice." Again the demand is directly linked up with expenses for work done in pursuance of and specified in a particular notice. That again to my mind makes it clear that the demand contemplated by this little code is a demand which has reference to expenses incurred on each house separately. In my opinion a demand which fails in either of those two matters is not a demand which creates a legal liability to pay. It may be a demand ought to contain more. I am expressing no view about that. I can see there are very strong reasons for saying that the demand at any rate ought to tell the person on whom the demand is served in respect of what work, in some detail, the amount is claimed. But this is to be pointed out, that the form of demand prescribed by the Minister in the Housing Acts (Form of Orders and Notices) Regulations, 1932, cl. 2, Schedule (S. R. & O., 1932, No. 354), Form No. 3, does not contain details of that kind. That form supports the view that it must be a demand in respect of each particular house, and a demand which is on the face of it the demand of the local authority, signed by their recognized agent, the clerk. That form does not seem to me to indicate that the work has to be described, but it does indicate that my view is right that at any rate it has to be a demand in respect of a particular house.

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(1) Ante, p. 254, Note (1).

The next matter which arises is the point strenuously urged, that all these matters were matters which could have been raised on an appeal to the county court under s. 22. Mr. Macassey for the plaintiffs places considerable reliance upon the word "quash" in sub-s. 2 (i.), which clearly gives the county court judge power to declare the notice wholly ineffective. I think this is a question of considerable difficulty, but in my view if the document called the demand is one which does not create a legal liability to pay, it cannot subsequently create such legal liability because of a failure to appeal. It is quite true that s. 18, sub-s. 4, providing for the time from which the time limit of six months is to run, says that it is to be reckoned from the date of the service of the demand or, if an appeal is made against that demand, from the date on which the demand becomes operative. But I do not think that quite touches the point that there has to be a good demand to create a legal liability. If the demand is not one which satisfies the statutory requirements, I cannot for my part see how a neglect to appeal can turn it into a good demand. A neglect to appeal certainly debars a defendant from making any objection to such matters as the amount, whether the work has been done, the reasonableness of the charges, and so on. It is quite clear that a county court judge must be able to deal with some such objections as are raised in this case, because if the defendants had appealed it would have jumped to the eye of everybody that this was a bad notice, and I think the county court judge could have said: I quash it; it is a bad notice. But s. 22, sub-s. 1 (*b*), says "Any person aggrieved by," not any demand, good, bad or indifferent, but "a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice." Why is it all set out at such length? Supposing some of these houses had been mortgaged. What is a mortgagee to do when he gets served with a demand of this kind? I cannot myself see that there is any obligation on a person receiving a demand of this sort to appeal if the demand does not come within s. 22, sub-s. 1 (*b*). I think all statutes of this kind, which confer upon local authorities rights which some people think are harsh, are to be dealt with strictly, and I do not think I have any right practically to eliminate from that sub-section words which I am satisfied were put in to indicate the nature of the demand against which a person can, and indeed must, appeal.

That disposes of the whole action, and the result is that I think there must be judgment for the defendants with costs. The plaintiffs, if they wish to go further, must serve proper demands in respect of each house. Of course nothing I have said means that if a wrong sum is in the demand, because too much is demanded, that that takes the demand outside the Act. So long as it is a demand in respect of a particular house it is a demand which complies with the statute in form, and is one which is good on the face of it. The amount can be rectified by the county court judge.

Solicitor for plaintiffs: *G. F. Thompson, West Ham.*
Solicitors for defendants: *W. A. & H. Elmore Smith.*

W. L. L. B.

1934
April 19, 20.

In re NATIONAL HEALTH INSURANCE ACT, 1924; *In re* PROFESSIONAL PLAYERS OF ASSOCIATION FOOTBALL.

Insurance (National)—Health—Insurability—Professional players of games—Association Football—National Health Insurance Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 38), *s.* 1, *sub-ss.* 1, 2; *Sch. I., Part I.* (*a*), *Part II.* (*k*).

Professional players of games who receive remuneration exceeding in value 250*l.* a year are not insurable under the National Health Insurance Act, 1924.

A professional player of Association football was employed to play for a club for a year at a salary of 6*l.* a week during the "close" season and one of 7*l.* a week during the playing season, with extra pay when playing in the first team and bonuses for playing in won and drawn matches:—

Held, that his employment was not "by way of manual labour" and, therefore, as his rate of remuneration exceeded in value 250*l.* a year, he fell within the exception to liability to be insured contained in Part II. (*k*) of the First Schedule to the Act.

1934

NATIONAL HEALTH INSURANCE ACT, 1924, *In re.* PROFESSIONAL PLAYERS OF ASSOCIATION FOOTBALL, *In re.*

REFERENCE by Minister of Health under s. 89, sub-s. 1 (iii.), of the National Health Insurance Act, 1924.

On November 21, 1933, Millwall Athletic and Football Club, Ld., applied to the Minister of Health under the National Health Insurance (Decision of Questions) Regulations, 1924 (St. R. & O. 1924, No. 1337), made under the National Health Insurance Act, 1924, for the determination of the question whether the employment by them of one Leonard Graham as a professional player of Association football was employment within the meaning of the Act.

Graham was employed under an agreement in writing which provided that he should play to the best of his ability for the club for a year, attending the club ground for training, observing certain rules, regulations and by-laws, and receiving a salary of 6*l.* a week during the " close " season and one of 7*l.* a week during the playing season, with an extra 1*l.* a week when playing in the first team, and certain bonuses for playing in won or drawn matches.

The Minister stated the case for the opinion of the Court whether a professional football player who was in receipt of remuneration exceeding 250*l.* a year was insurable under the Act of 1924 as being employed " by way of manual labour " within Part II. (*k*) of the First Schedule to the Act. (1)

Harold Murphy and *H. E. Kingdon* for the Minister of Health. The occupation of a professional footballer is " employment . . . . by way of manual labour ": see per Cozens-Hardy M.R. and Fletcher Moulton L.J. in *Walker* v.

(1) By the National Health Insurance Act, 1924, s. 1, sub-s. 1: Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this Act shall be . . . . insured in manner provided in this Act. . . . .

By sub-s. 2: The persons employed within the meaning of this Act . . . . shall include all persons . . . . who are engaged in any of the employments specified in Part I. of the First Schedule to this Act, not being employments specified in Part II. of that Schedule.

First Schedule, Part I. Employments within the meaning of the Act. (*a*) Employment in the United Kingdom under any contract of service. . . . .

Part II. Exceptions. . . . . (*k*) Employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value 250*l.* a year. . . . .

Crystal Palace Football Club, Ld. (1) The test, as exemplified in *In re Hedger* (2) (where a dental mechanic was held to be insurable) and in *In re McManus* (3) (where a music-hall performer, whose performance consisted of an acrobatic and clowning turn involving silent comedy acting, was held not to be insurable), is whether or not the physical element in the occupation predominates over the mental element. In the case of a footballer the substantial nature of the employment is the physical use of the limbs.

Hawke for applicants. A professional footballer is not employed " by way of manual labour." In *Walker* v. *Crystal Palace Football Club, Ld.* (4), the sole question was whether the footballer concerned worked " under a contract of service " with the club for whom he played, within s. 13 of the Workmen's Compensation Act, 1906. The observations of Cozens-Hardy M.R. and Fletcher Moulton L.J., to which reference has been made were purely obiter and, it is submitted, should not be followed. The footballer in the present case, like McManus, was rather a public performer than a workman. (5) He was employed for his skill, to which his physical labour was " only incidental and accessory " : per Swinfen Eady J., in *In re National Insurance Act,* 1911. (6)

ROCHE J. On this reference by the Minister of Health under s. 89, sub-s. 1 (iii.), of the National Health Insurance Act, 1924, I have power to determine questions of fact as well as of law. The position is, therefore, different from that on an appeal to the Court from a decision of the Minister under s. 89, sub-s. 1 (i.), when the Court can only deal with a question of law.

The question raised by this reference is whether the occupation of a professional football player is " employment . . . . by way of manual labour " within Sch. I., Part II. (*k*), to the National Health Insurance Act, 1924. I do not think that there is any doubt that it is not " employment . . . .

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(1) [1910] 1 K. B. 87, 92, 93.

(2) July 30, 1929, Unreported.

(3) (1933) 148 L. T. 406.

(4) [1910] 1 K. B. 87.

(5) 148 L. T. 406, 407.

(6) [1912] W. N. 229.

by way of manual labour," but certain observations made by two members of the Court of Appeal in *Walker* v. *Crystal Palace Football Club, Ld.* (1) have given rise to the supposition that it may be. Walker's remuneration not being in excess of 250*l.*, he was a " workman " within s. 13 of the Workmen's Compensation Act, 1906, if he worked " under a contract of service . . . . with an employer, whether by way of manual labour, clerical work, or otherwise " and the question which the Court of Appeal had to decide was whether or not he worked under a contract of service. The Court answered that question in the affirmative and their decision was no doubt unimpeachable. Unfortunately, the members of the tribunal were induced to consider the question whether a professional footballer was employed by way of manual labour, and two of them made certain observations obiter to the effect that such employment might be described as manual labour. With those dicta I am not concerned. They do not govern any decision of mine and I am not prepared to assent to them. They are contrary to decisions which I have given under this Act in *In re Hedger* (2) and *In re McManus* (3), and also to other decisions with which I dealt in *In re Hedger.* (2)

In re McManus (3) may be usefully referred to as illustrating my opinion on these matters. McManus was a professional funny man who did a great deal of acrobatic business in the course of his performance. It was said that that was laborious and, therefore, manual labour. In giving judgment (4), I said: " The test is whether the work with the hands is the essence of the work, or whether it is some other power or quality in the employment which is the essential matter." Here a professional footballer, like a professional cricketer, is essentially a person who works with his acquired or inherited skill in play, fortified and improved by continuous instruction, study and practice.

Apart from that altogether, play and work are two different things and professional footballers are not engaged in work but in play. They play for reward, but they still play a

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(1) [1910] 1 K. B. 87.

(2) Unreported.

(3) 148 L. T. 406.

(4) Ibid. 407.

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game. It may be said that they are working at their play. So they are, but what they are not doing is working at manual labour. In *In re Vellacott and Others* (1), under the Unemployment Insurance Act, 1920, I decided that a huntsman of a pack of foxhounds and other hunt servants were engaged under contracts of service with the master of hounds. In my view, they, like a professional footballer or cricketer, are not engaged in manual work, but in performing a leading part in a well known field sport. Professional footballers and cricketers are engaged as exponents of the game which they play to entertain other people.

For these reasons I hold that this professional footballer, Graham, is not employed " by way of manual labour," and, as he is in receipt of a rate of remuneration which exceeds 250*l*. a year, that he is not insurable under the National Health Insurance Act, 1924.

Certificate accordingly.

Solicitor for Minister : *Solicitor to the Ministry of Health.*

Solicitors for Club : *Brash Wheeler, Chambers, Davies & Co., for C. E. Sutcliffe & Son, Rawtenstall.*

(1) [1922] 1 K. B. 466.

G. F. L. B.

K. B. D.
1934
March 8.

C. A.
May 4.

RYE & EYRE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income tax—Copyright—Royalties—Play produced by company in London—Author a foreigner resident abroad—Royalties in advance transmitted by company's solicitors to author's agent abroad without deduction of tax—Assessability of solicitors to tax—" By or through whom any payment is made "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 21*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *ss.* 25, 26.

By an agreement in writing between the promoter of a limited company formed to present in London a play by a French dramatist and the agent of the dramatist, the promoter of the company undertook to pay to the dramatist 300*l.* in advance on account of royalties. In pursuance of that agreement, the solicitors of the promoter of the company, at his request, paid to the agent in Paris of the dramatist 300*l.* out of money in their hands at the disposal of the promoter. The production of the play resulted in a loss and no further sums were paid to the dramatist or his agent by way of royalties :—

Held (affirming the decision of Finlay J.), that the solicitors were chargeable to income tax on the 300*l.* as being " the persons by or through whom " a payment had been made on account of royalties where the usual place of abode of the owner of the copyright was not within the United Kingdom, within r. 21 of the All Schedules Rules to the Income Tax Act, 1918, as amended by s. 25 of the Finance Act, 1927.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Special Commissioners on November 24, 1932, the appellants, Messrs. Rye & Eyre, solicitors, of Golden Square, W., appealed against an assessment to income tax in the sum of 300*l.* for the year ending April 5, 1931, made on them under the provisions of s. 26 of the Finance Act, 1927, as extended by s. 25 of the Finance Act, 1927, in respect of a payment made to a French actor and dramatist, M. Sacha Guitry, on account of copyright royalties.

In June, 1930, a Mr. Lionel Barton was proposing to form a company with the object of producing in London an English version of a play called *Desire*, written by M. Guitry. The company was registered on July 3, 1930, under the name of the Long Acre Syndicate, Limited. Pending its formation

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Mr. Barton negotiated with Mr. F. Howell, M. Guitry's agent, an agreement for a licence for the performance of the play on payment of royalties, one of the terms being that on its being signed a sum of 300*l.* should be paid in advance on account of the royalties thereinafter stipulated.

On June 23, 1930, Mr. Barton called on Messrs. Rye & Eyre, who acted as solicitors for him, and, after its incorporation, for the company, which was then about to be formed, and instructed them to forward the agreement in duplicate to Mr. Howell and out of moneys which had been placed in their hands on account of the then proposed company (but of which Mr. Barton had the disposition on June 23, 1930), to pay the sum of 300*l.* in accordance with the above-mentioned provision of the agreement.

On the same date Messrs. Rye & Eyre forwarded the agreement in duplicate to Mr. Howell, with their cheque for 300*l.*, accompanied by a covering letter in the following terms :—

June 23, 1930.

Dear Sir—

Mr. Sacha Guitry and Mr. Lionel H. Barton.
Desire
Long Acre Syndicate.

On the instructions of Mr. Barton, we enclose the two parts of the agreement, one of which has been executed by him, together with our cheque for £300 (the amount of royalties payable in advance under Clause 3) and should be glad if you would kindly return the other part to us signed by Mr. Guitry *as early as possible*, as the play is billed for production at the New Theatre on July 2.—Yours faithfully, Rye & Eyre.

F. Howell, Esq.,
6, Rue de la Paix,
Paris.

The cheque for 300*l.*, which was drawn payable to Mr. Howell, was cashed in due course. The production of the play resulted in a loss to the company, and, in the events which happened, no further sums were paid or payable to M. Guitry on account of royalties in respect of the performance of the play.

When the question of income tax was subsequently raised by the revenue authorities, the appellants endeavoured to persuade Mr. Barton, M. Guitry, and Mr. Howell to pay the tax, but without success.

It was not disputed that M. Guitry's usual place of abode was not within the United Kingdom, and that the sum of 300*l.* paid to him was a payment on account of royalties paid in respect of a copyright of which M. Guitry was the owner.

It was contended for Messrs. Rye & Eyre that: (*a*) They were not persons by or through whom any payment giving rise to liability to tax was made; and (*b*) they were not liable to account to the Revenue for income tax on the sum of 300*l.* paid to M. Guitry.

It was contended for the Crown that (*a*) Messrs. Rye & Eyre were persons through whom the sum of 300*l.* had been paid to M. Guitry on account of copyright royalties; and (*b*) as such they were chargeable to income tax in respect of such payment under r. 21 of the Rules applicable to All Schedules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, and applied to copyright royalties by s. 25 of that Act. (1)

The Commissioners held that Messrs. Rye & Eyre were chargeable as persons through whom the payment in question was made, and confirmed the assessment.

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(1) By r. 21 of the All Schedules Rules to the Income Tax Act, 1918:

"(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

Sect. 25 of the Finance Act, 1927, applies r. 21 to "any payment of or on account of any royalties or sums paid periodically for or in respect of" a copyright where the usual place of abode of the owner of the copyright is not within the United Kingdom, and s. 26 amended the method of assessment in cases under r. 21.

Cyril King for appellants.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown.

Finlay J. I am of opinion that the decision of the Special Commissioners was correct.

The first thing to look at is r. 21 of the All Schedules Rules to the Income Tax Act, 1918. (1) That rule provides: "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment." Then one has to look at s. 25 of the Act of 1927, a section designed to stop a very obvious hole in the collection of tax. That section says this: "Where the usual place of abode of the owner of a copyright is not within the United Kingdom, Rule 21 of the General Rules shall apply to any payment of or on account of any royalties or sums paid periodically for or in respect of that copyright as it applies to annual payments not payable out of profits or gains brought into charge." Sect. 26 of the Act of 1927 effects an amendment of r. 21 by substitution of a new paragraph for the para. 2 which had been in that rule. The substitution is a little important, and it is this: "Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person."

It appears to me to be abundantly clear what is the object of those provisions. The liability to tax was in

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(1) See note (1) ante, p. 272.

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existence previously, but until that amendment of the law there was a serious difficulty of collection. The recipient could be effectively assessed only if he or an agent of his could be found in this country. That, obviously, might be difficult. That position was dealt with by an alteration and improvement of the machinery of the collection of the tax, which is an alteration and improvement of machinery and nothing else. It does not increase the ambit of the tax. It makes it more easy to collect the tax within the ambit already laid down. The only other section which it is fair to refer to is s. 18 of the Finance Act, 1930. I do not think that it has a direct bearing on the point before me, but I agree with Mr. Hills that sub-s. 3 of that section rather supports his argument.

The Special Commissioners have decided that the assessment was properly made because the appellants were chargeable to income tax as persons through whom the payment in question was made. The matter is not really one which admits of any lengthy statement. What one has to consider is whether this payment was made "by or through"—either will do, but "through" is the one principally relied upon—Messrs. Rye & Eyre. The argument put by Mr. King was that "by" has reference to the actual payer of money and "through" has reference only to an agent of the recipient. In that connection he relied upon s. 18 of the Finance Act, 1930. In my view that section does not help him. I do not doubt that the word "through" would cover the agent of a recipient, but I see no reason at all to restrict it to that. My difficulty has been to give a construction to the words "by or through whom any such payment is made" which would not on the facts of this case cover the appellants here. I am unable to do so. We can only say that "by or through whom any such payment is made" means what it says. It seems to me that, without deciding any case not before me and without saying anything about cases where mere messengers, or banks, who may know nothing of what they are doing, are referred to, Messrs. Rye & Eyre, on the facts of this case, were the persons by or through whom this payment was made and that they are accordingly liable to be assessed as the Special Commissioners decided.

This appeal must be dismissed.

Appeal dismissed.

G. F. L. B.

Messrs. Rye & Eyre appealed. The appeal was heard on May 4, 1934.

Croom-Johnson K.C. and *P. B. Showan* for the appellants.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the Crown.

LORD HANWORTH M.R. We need not trouble you, Mr. Attorney.

This case is really quite a plain one. I should like to say no more than that I associate myself with and support the reasoning of Finlay J. and the result arrived at; but in deference to the argument that has been presented I will just say a few words. First of all, it must be remembered that an agent is a proper person in proper cases to be taxed; that is provided by s. 103, sub-s. 1, of the Income Tax Act, 1918, as follows: "Every person who, in whatever capacity, is in receipt of any money or value, or of profits or gains arising from any of the sources mentioned in this Act, of or belonging to any other person who is chargeable in respect thereof, or who would be so chargeable if he were resident in the United Kingdom and not an incapacitated person, shall, whenever required to do so by any general or particular notice, prepare and deliver" and so on. Therefore, every person who is dealing with property and money which is payable to a person who is chargeable in respect thereof, whether resident in this country or not, must bear in mind his duty to attend to and obey the income tax laws. In the present case the property with which we have to deal and the property from which this income arises is definitely property in this country. It is copyright, and that is property secured by the laws of this country to the owner of the copyright wherever he happens to be resident. In this case he was resident abroad, and the income was payable to him in respect of that property which the laws of this country gave to him. He had an agent and that money was remitted to him by the agent. Sect. 25 of the Finance Act, 1927, deals with the payment of income tax on certain sums payable in respect of copyright by deduction, and it is said that this particular payment was not within the section because it was a payment down on the signing of the agreement in respect and on account of the royalties which would accrue and were supposed to accrue in the course of the agreement, royalties which were dependent upon the weekly receipts when they came up to 1000*l*. and at a different rate when they rose beyond that. What are these royalties ? They would be sums which would be paid according to the week's takings from week to week, and this sum of 300*l*. was on account of royalties which were to be paid periodically. It seems to me to be exactly within the wording of sub-s. 1.

Lastly, let me add this, that we are not dealing with a case in which the territorial extent of the Income Tax Acts has to be considered. I am looking at the old case of *Colquhoun* v. *Brooks* (1) and Lord Herschell's well known judgment : "The Income Tax Acts, however, themselves impose a territorial limit ; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there. If the latter condition be fulfilled, I think it is competent for the legislature to determine the measure of taxation to be applied in the case of a person so resident. At the same time, I am far from denying that if it can be shewn that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country it would afford a reason for adopting some other interpretation if it were possible consistently with the ordinary canons of construction." But here we are dealing with a taxable income derived from property which is situate in and is derived from the United Kingdom. We have not to think of any question of territorial limit because the source of the

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(1) (1889) 14 App. Cas. 493, 504.

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income upon which the charge falls is entirely within the territorial limits. Under those circumstances these further sections which have been introduced and the alteration of r. 21 are mere machinery, and it must be remembered that under r. 19 of the All Schedules Rules there is an abundant justification given to the person who pays as against his principal to rely upon the deduction as money which has been paid for and on account of the principal. For these reasons, which I have only added out of courtesy to Mr. Croom-Johnson and to Mr. Showan, the appeal must be dismissed with costs.

SLESSER L.J. I agree, and have nothing to add.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellants : *Rye & Eyre.*
Solicitor for Crown : *Solicitor of Inland Revenue.*

W. I. C.

1934
April 27, 30.

THE KING *v.* LIVERPOOL JUSTICES.

Ex parte LIVERPOOL CORPORATION.

Licensing (Intoxicating Liquor)—Justices' licence—Special removal—Application by licensee after termination of lease under which he held licensed premises—Unlawful occupation—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 24, *sub-s.* 2 (*a*).

Licensed premises consisted mainly of premises held by a brewery company on lease and to a lesser extent of an extension of the original premises built on an adjoining site held by the company in fee simple, the licensee being an employee of the company. The lease expired on May 6, 1933, but the company and the licensee remained in occupation of the whole premises. On July 18 a private Act became law by which local authorities were empowered to acquire certain property, including the premises in question, to aid in the construction of a tunnel. On October 6, in proceedings instituted by the lessors under the lease, an order was made for the possession of the leasehold part of the premises as from May 6. On October 21 the licensee gave notice of an application to the licensing justices under s. 24, sub-s. 2 (*a*), of the Licensing (Consolidation) Act, 1910, for the special removal of the licence to other premises owned by the brewery company on the ground that the premises in respect of which the licence had been granted were

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about to be pulled down under an Act for a public purpose. On October 24 the company and the licensee ceased to occupy the premises :—

Held, that as the licensee was the holder of the licence which had been granted in respect of the premises and as the premises were about to be pulled down under an Act for a public purpose, the licensing justices were entitled in their discretion to grant the licensee an order for the special removal of the licence, although at the time of his application therefor he was not in lawful occupation of the leasehold part of the premises.

Per Curiam : There is no provision in the Licensing (Consolidation) Act, 1910, which requires the applicant for the special removal of a licence to be in actual occupation of the licensed premises at the time of his application.

Reg. v. *Yorkshire* (*West Riding*) *Justices. Ex parte Shaw* [1898] 1 Q. B. 503 distinguished.

Held, further, that, the order being for a special as distinct from an ordinary removal, the consent of the lessors to the order was not necessary ; and that, as the lessors were never in a position to apply for the transfer of the licence to their nominee or its removal to other premises belonging to them so long as the licensee remained the holder of the licence and he and the company remained in occupation of the premises or part of them, they had not been deprived of any right vested in them so to do and were, therefore, not entitled to a writ of certiorari to quash the order.

RULE NISI for certiorari.

By an indenture dated May 7, 1858, certain land in Dale Street, Liverpool, with the buildings thereon were let by the Corporation of Liverpool to one Norris, for a term of 75 years. In 1868 Norris obtained a licence to sell intoxicating liquor on the premises. In 1893 the unexpired term of the lease was acquired by the predecessors in title of Peter Walker & Son (Warrington & Burton), Ld., brewers, who, in 1903, purchased some 30 square yards of land adjacent to the licensed premises, and built on it lavatories and an extension of the licensed premises, which were known as the Junction Hotel.

On May 6, 1933, the date of the termination of the lease, one James Suett, a manager employed by the brewery company, was the holder of a justices' licence in respect of the premises. After the termination of the lease Peter Walker & Son (Warrington & Burton), Ld., remained in possession of the leasehold portion of the premises under an arrangement with the corporation.

On July 18, 1933, the Mersey Tunnel Act, 1933 (23 & 24 Geo. 5, c. xxxix.), became law. By it certain local authorities were empowered compulsorily to acquire certain property, including the site of the Junction Hotel, to aid in the construction of a tunnel under the River Mersey.

On July 25 the corporation gave the brewery company notice to quit the leasehold part of the premises on August 12. The company failed to comply with that notice. Proceedings were therefore taken by the corporation, and on October 6 Branson J. made an order for the possession of the premises as from May 6, with mesne profits.

On October 21 the licensee gave notice of an application under s. 24, sub-s. 2 (*a*), of the Licensing (Consolidation) Act, 1910 (1), for the special removal of the licence which he held in respect of the Junction Hotel to premises known as the Tuebrook Hotel, West Derby Road, Liverpool, on the ground that the Junction Hotel premises were about to be pulled down under the Mersey Tunnel Act, 1933. On October 24 the brewery company and the licensee went out of possession and occupation of the leasehold part of the Junction Hotel.

On November 7 the application of the licensee for the special removal of the licence was granted at a special transfer session of the licensing committee of the Liverpool justices on the ground that the premises in respect of which the licence had been granted were about to be pulled down under an Act for the improvement of highways or some other public purpose, within the meaning of s. 24, sub-s. 2 (*a*), of the Act.

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(1) By the Licensing (Consolidation) Act, 1910, s. 24, sub-s. 2: A removal of a justices' licence may . . . . be authorized by the licensing justices at their discretion, either on an application for the purpose made on any ground (in this Act referred to as an ordinary removal), or on an application made on the special ground—

(*a*) that the premises in respect of which the licence has been granted are or are about to be pulled down or occupied under any Act for the improvement of highways, or for any other public purpose; or

(*b*) that the premises in respect of which the licence has been granted have been rendered unfit for use for the business there carried on under the licence by fire, tempest, or other unforeseen and unavoidable calamity.

(in this Act referred to as a special removal.)

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On December 21 a rule nisi was obtained by the Liverpool Corporation calling on the justices to show cause why a writ of certiorari should not issue to remove into the High Court the special removal order made by them on the ground that it had been granted in excess of the jurisdiction of the justices and without the consent of the corporation who had been wrongfully deprived of their right to have the licence transferred to their nominee or assign or to apply for the special or ordinary removal of the licence to other premises belonging to them.

Montgomery K.C. and *Hartley Shawcross* for the brewery company, showing cause. On October 21, 1933, when the application was made for the special removal of the licence, Suett still held the licence which had been granted in respect of the premises and he was, therefore, the only person who could apply for a special removal under s. 24, sub-s. 2 (*a*), of the Act of 1910. That clearly appears when the sub-section is read with the Form of Special Removal of a licence made under the Act: see Paterson's Licensing Acts, 1934, 44th ed., p. 1283. The fact that since May 6, 1933, he had not been able to sell liquor on the premises did not alter his position because the termination of the tenancy did not involve the avoidance of the licence, although it may have made it temporarily valueless. Moreover, the section clearly contemplates that inability to carry on the business on the premises is not to be a bar to a special removal, since one of the grounds for granting a special removal is that the premises have been pulled down. The justices are not called on to inquire into whether an applicant for a special removal is in occupation, or in lawful occupation, of the premises. All the Act requires them to consider is whether the applicant has a licence, whether he is a fit person to hold it, and whether the premises to which it is proposed to remove it are fit and convenient and substantially similar to the old premises: see Paterson's Licensing Acts, 1934, 44th ed., p. 615. It is true that in *Reg.* v. *Yorkshire* (*West Riding*) *Justices. Ex parte Shaw* (1) it was decided that an application under the

(1) [1898] 1 Q. B. 503.

Alehouse Act, 1828, for the transfer to other premises of the licence granted in respect of premises which had been pulled down must be made by a licensee who was keeping the old premises as an inn at the time of their demolition, but that decision was on s. 14 of the Act of 1828, which provided that a transfer could only be granted "if any house, being kept as an inn . . . . shall be or be about to be pulled down . . . ." The words "being kept as an inn" were deliberately omitted from s. 24, sub-s. 2 (*a*), of the Act of 1910. See also *Leeds Corporation* v. *Ryder*. (1) Liverpool Corporation had no right to object to Suett's application as no notice of the application need be given to the owner of the premises in the case of a special removal as there must be in the case of an ordinary removal: compare s. 26, sub-ss. 4 and 5, of the Act of 1910, with s. 27. Nor could the corporation apply for a licence for their nominee or for a removal of the existing licence to other premises of their own because part of the licensed premises was the freehold property of the brewery company.

Cassels K.C. and *Maxwell Fyfe K.C.* for the licensee, showing cause. The corporation could not have successfully objected to the application and could not have dealt with the licence themselves, nor did they have cause for complaint on any other grounds. If Suett had surrendered the licence on May 6 the corporation would have received back the premises without any licence being in existence with respect of them, and they would have been compelled to accept that position since, in the absence of specific provision in a lease, a licence does not enure for the benefit of the lessor. The Court will not supply a protection for the lessor which is not supplied by the statute, nor, in this case, by the lease: per Lord Halsbury L.C. in *Laceby* v. *Lacon & Co., Ld.* (2) Certiorari is in the discretion of the Court and where to grant it would cause great hardship, as it would here to the licensee, the Court will refuse the writ.

Singleton K.C. and *Sellers* for the corporation, in support of the rule. On October 21, 1933, neither the brewery company

(1) [1907] A. C. 420.

(2) [1899] A. C. 222, 227, 228.

nor the licensee had had any right to be on the premises for more than five months. If a licensee has lost all his legal interest in the licensed premises he cannot apply for a special removal of the licence since he must show not only that the premises are, for example, about to be pulled down but also that he is adversely affected thereby. That must be implied in the provisions of the Act, because, if an individual is given a statutory right to an order on special grounds, the natural presumption is that those special grounds affect him and the pulling down of premises cannot affect a tenant who has ceased to have any interest in them. Secondly, s. 24, sub-s. 2, of the Act contemplates a licensee in lawful occupation of the premises in respect of which he holds his licence and that he is carrying on his business there. The difference between the wording of s. 14 of the Alehouse Act, 1828, and that of s. 24, sub-s. 2, of the Act of 1910 is immaterial on this point. *Reg.* v. *Yorkshire* (*West Riding*) *Justices. Ex parte Shaw* (1) is still good law. A licence attaches to the premises in respect of which it is granted. That appears from the statutory form of the licence which provides for the sale of liquor at a specific place: see Form of Grant of Justices' Licence, Paterson's Licensing Acts, 1934, 44th ed., pp. 1280, 1285. Consequently, after the termination of the licensee's lawful occupation of the premises there was no effective licence which could be removed. Thirdly, the licensee was not deprived of his use of the premises through their demolition, or threatened demolition, which is the very basis of s. 24, sub-s. 2 (*a*), of the Act of 1910, but by the termination of the lease on May 6, 1933. The corporation have a particular interest in the subject-matter of this application: per Lord Reading C.J. in *Rex* v. *Richmond Confirming Authority. Ex parte Howitt* (2), and the rule obtained by them should be made absolute. On the other hand, the brewery company have suffered no hardship because their interest in the premises ended, as they always knew it must end, with the lease.

LORD HEWART C.J. It is important to remember not only

(1) [1898] 1 Q. B. 503.

(2) [1921] 1 K. B. 248, 253.

that this was a special removal order under s. 24, sub-s. 2 (*a*), of the Licensing (Consolidation) Act, 1910, but also that that section differs in very material particulars from the corresponding words in s. 14 of the Alehouse Act, 1828. It was under the Act of 1828 that *Reg.* v. *Yorkshire* (*West Riding*) *Justices. Ex parte Shaw* (1) was decided. Sect. 14 of that Act provided that " if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways or for any other public purpose . . . . it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways or for any other public purpose . . . . and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail . . . ." No such words as " house being kept as an inn by any person duly licensed as aforesaid " appear in s. 24, sub-s. 2, of the Act of 1910.

It seems to be tolerably clear from the wording of both parts of that sub-section that at the time when the application is made the premises in respect of which the licence has been granted may be premises on which it is physically impossible to carry on the business of a licensed seller of liquor. The application, for instance, may be made on the ground that the premises " are pulled down," which obviously means " have already been pulled down." It is also obvious that, where the premises have been rendered unfit for use by fire, or tempest, or other unforeseen and unavoidable calamity, there must be, at the time when the application is made, no premises on which the licensee can carry on his business. That being so, it appears to me that in the present case the licensee, Suett, was entitled to say that he was the holder of a licence in respect of premises which were about to be pulled down under an Act of the kind mentioned in the statute.

I do not think it material, although at first blush it may seem to be so, that the lease of the leasehold part of the premises expired some months before the licensee's application was heard and the removal order made. Great stress has been laid in the argument in support of the rule on the suggestion that it is necessary that an applicant under s. 24. sub-s. 2, must be in actual occupation of the premises at the time of the making of the application. No such provision is to be found in the section, and, indeed, it is difficult to see how a person can, except in a highly artificial sense, be said to be in occupation of premises which have been pulled down or destroyed by fire. As a matter of fact, in the present case, at the time when notice of the application was given the licensee was in occupation of the premises. Let it be granted that he was in occupation in somewhat peculiar circumstances, but the premises were in existence, partly freehold and partly leasehold, and the licensee was in occupation of the whole. Therefore, I do not think that the justices usurped a jurisdiction which they did not possess, or that they purported, by an erroneous view of the law, to give themselves a jurisdiction which they did not have.

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(1) [1898] 1 Q. B. 503.

The words which impress me in s. 24, sub-s. 2 (*a*), are "the premises in respect of which the licence has been granted." There is no ground at all for the suggestion that the premises with which we are concerned here were not premises in respect of which a licence had been granted, nor that the licensee, being undoubtedly the person to whom the licence had been granted, was not the person to apply under the sub-section for an order for special removal of that licence. Whether he was entitled to an order was a matter for the justices in the exercise of their discretion and it may be that, if the lease had contained a covenant that on its termination the lessee should hand back the premises to the lessors as licensed premises, the justices would not have exercised their discretion in the way in which they did. As there was no such covenant, and as the premises were unlicensed when the lease was granted, I think that the justices, in the circumstances of this case, acted within their discretion in making this order for special removal.

A further ground on which the rule was obtained was that the order complained of was granted without the consent of the Liverpool Corporation, who became entitled to the greater part of the premises on May 6, 1933. That, no doubt, is true, but in the case of a special removal it is not necessary, as it is in the case of an ordinary removal, that the registered owner of the premises should make no objection. Clearly, under s. 26, sub-ss. 4 and 5, it is fatal to an application for an ordinary removal if the registered owner should object. But we are dealing here with a special removal which differs greatly from an ordinary removal. It does not arise voluntarily as does an ordinary removal, and, while an order for an ordinary removal is not valid unless it is confirmed by the confirming authority, no such ingredient exists in the case of a special removal. It seems to me that there has been here a certain confusion between the procedure applicable in the case of an ordinary removal and that applicable in the case of a special removal. It may be added that it does not appear in the evidence that the corporation were the registered owners of these premises, and, indeed, they could not be the registered owners of that part of them of which the fee simple was in the brewery company.

The third ground in the rule alleges that the corporation have been wrongfully deprived of their right to have the licence transferred to their nominee or assigns, or to apply for a special or ordinary removal of the licence to other premises belonging to them. The answer to that is that the corporation never had such a right, and, therefore, they could not be deprived of it. They did not put themselves, nor could they put themselves, in a position to have the licence transferred to their nominee, or to apply for any removal order.

I think, therefore, that this rule should be discharged.

AVORY J. I agree. In my opinion, the only question for our decision is whether, on October 21, 1933, James Suett was entitled to apply for a special removal of the licence. If he was, then, under s. 24, sub-s. 2, of the Act of 1910, the justices had a discretion to grant it and it is not suggested that the conditions precedent to the exercise of their discretion, which are specified in s. 27, had not duly been fulfilled, or that their discretion was not judicially exercised. The only grounds suggested in the rule are (1.) that James Suett was not in occupation of the whole of the licensed premises at the time when the application was made, and (2.) that the order was made without the approval of the corporation.

With regard to the first point, there is no provision in the statute which requires the applicant for an order for special removal to be in occupation of the whole of the licensed premises. The only provision is that he should be the holder of the licence: see the Form of Special Removal of a Justices' Licence, Paterson's Licensing Acts, 1934, 44th ed., p. 1283. The form is in these terms: "The licensing justices . . . . hereby authorise the special removal of the justices' licence hitherto held by A. B. in respect of the licensed premises situated at—. . . ." There is no question here that James Suett was the person who had hitherto held a licence in respect of these premises. Furthermore, on the question of occupation, James Suett was in fact in occupation of the freehold portion of the premises which might have been enlarged and themselves licensed.

As to the ground that the order was made without the consent of the corporation, the short answer to that is that the Act does not require, in the case of a special removal, the consent of the owner of the premises, distinguishing it in that respect from an ordinary removal.

If James Suett was entitled to apply for this order, it appears to me that the alleged grievance set out in the grounds for the rule—that the corporation was deprived of their right to have the licence transferred or removed—is irrelevant. In fact, however, it is without foundation, for the corporation never were in a position to have the licence transferred to their nominee, nor were they in a position to apply for the special or ordinary removal of it so long as James Suett remained the holder of it, and he and the brewery company remained in occupation of the premises, or part of them. The corporation are not specially aggrieved so as to entitle them to this writ ex debito justitiae. That being so, this Court has a discretion in granting the writ and I see no ground for interfering with the discretion exercised by the justices.

The only case referred to in support of the rule on the point relating to the occupation of the premises was *Reg.* v. *Yorkshire* (*West Riding*) *Justices. Ex parte Shaw* (1), and that really affords no authority, since the words in the Act under consideration there—the Alehouse Act, 1828—expressly required that the person applying for the removal should be the person who at the time of the application was keeping the premises as an inn. No such words appear in the Act of 1910.

I agree that the rule should be discharged.

MACKINNON J. I agree.

Rule discharged.

Solicitors for brewery Company and licensee: *Godden, Holme & Ward, for Edwin Berry & Co., Liverpool.*

Solicitors for corporation: *F. Venn & Co., for Town Clerk, Liverpool.*

G. F. L. B.

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(1) [1898] 1 Q. B. 503.

1934
May 1, 2.

WORCESTERSHIRE COUNTY COUNCIL *v.* WARWICKSHIRE COUNTY COUNCIL.

Local Government—Mental Defective—Admission to certified Institution—Liability for Maintenance—Place of Residence immediately before Admission—Residence in another certified Institution—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 44—*Mental Deficiency Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 33), *s.* 9.

By s. 9 of the Mental Deficiency Act, 1927, where an order is made in respect of a mental defective in a certified institution, that person shall, for the purpose of determining who is liable for his maintenance, be deemed to have resided in the " place which was his place of residence immediately before he was received into the institution " :—

Held, that another certified institution could be such " place of residence."

Case stated by Worcestershire justices.

On October 3, 1933, at a court of summary jurisdiction sitting at Pershore, a complaint was preferred under the Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), s. 44, sub-s. 3, by Thomas Alfred Lewis, petitioning officer to the committee for the care of the mentally defective appointed by the council of the county of Warwick (hereinafter called " the respondents "), against the council of the county of Worcester (hereinafter called " the appellants ") for that on March 16, 1933, an order was made by Sir Francis John Davies, K.C.B., a justice for Worcestershire, being a judicial authority specially appointed under s. 10 of the Lunacy Act, 1890 (53 Vict. c. 5), directing that Michael Townsend, a defective, should be sent to a certified institution, known as Besford Court Certified Institution in the county of Worcester, and specifying the county of Warwick as the place in which the said Michael Townsend resided, and claiming that the liability of the respondents should be transferred to the appellants.

Upon the hearing of the said complaint the following facts were admitted: (*a*) The boy was born in Manchester on November 16, 1916, the parents being Charles Townsend and Rose Ann Townsend, the latter being of no fixed abode in

1923, when she was last heard of. (*b*) Charles Townsend, the father, was admitted to the New Cross Institution, Wednesfield (Wolverhampton Union), on June 18, 1921, and died in the institution on February 2, 1922. During the period February 1, 1922, to January 8, 1923, Mrs. Townsend and her four children (Michael being one of the four) were inmates of the New Cross Institution, Wednesfield. (*c*) On September 25, 1923, Mrs. Townsend and her four children arrived in Kidderminster (Worcestershire) from the hopfields at Ledbury and stayed in a common lodging house until September 29, 1923, on which date they left the lodging house. The mother deserted three of the children in Kidderminster, and they went to Kidderminster workhouse on September 29, 1923. On November 2, 1923, the three children, including Michael, were accepted by Dr. Barnardo's Homes, Birmingham, and were transferred to Father Hudson's Home, Coleshill (Warwickshire), on November 24, 1923, because they were found to be of Roman Catholic faith. (*d*) On April 1, 1925, Michael Townsend was admitted to the Coleshill Saint Edward's Roman Catholic elementary school. On account of his mental defect it was recommended that he be admitted to a special school for mentally defective children, and he was admitted to the Besford Special School (Warwickshire), chargeable to the Warwickshire Education Committee, on March 20, 1929. (*e*) The chargeability of the Warwickshire Education Committee ceased on December 31, 1932, the end of the school term in which the boy reached the age of sixteen.

On the part of the Warwickshire County Council it was contended: that the said Sir Francis John Davies was wrong in holding that the boy "resided" within the meaning of s. 9 of the Mental Deficiency Act, 1927 (17 & 18 Geo. 5, c. 33), in the county of Warwick, and that the Warwickshire County Council was responsible for his maintenance. They also contended that his last residence was in Kidderminster, Worcestershire.

On the part of the Worcestershire County Council it was contended: that Townsend's residence in Coleshill Home was a good residence for the purposes of the Mental Deficiency

Acts, that he never acquired a place of residence in Kidderminster, as his stay there was only a casual and temporary one and that the three days in a common lodging house did not constitute a residence, and that there was a real doubt as to the boy's place of residence at the time he was deserted by his parent, who was then a person of no fixed abode, and that the question of residence had to be decided in accordance with the law of poor law settlement under s. 44, sub-s. 4, of the Act of 1913.

The justices were of opinion that the contentions on the part of the respondents were correct and held that the liability for the maintenance of the said Michael Townsend should be transferred from the respondents to the appellants.

The question upon which the opinion of the Court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

John F. Bourke for the appellants. Townsend never acquired a "place of residence" at Kidderminster within the meaning of s. 9 of the Mental Deficiency Act, 1927 (1), because his stay there was only casual or temporary, not intended to be permanent. His place of residence "immediately before he was received" into the Besford school was in the Coleshill Home in Warwickshire, and he is to be "deemed to have resided" there within the meaning of the sub-section. If the Legislature had intended to exclude residence in certified institutions from the operation of s. 9

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(1) Mental Deficiency Act, 1927 (17 & 18 Geo. 5, c. 33), s. 9: "Section forty-four of the principal Act [Mental Deficiency Act, 1913] (which relates to the determination of residence) shall be amended by the insertion therein after subsection 2 of the following new subsection:—

(2A) Where the order is made by a judicial authority and is in respect of a person in an institution for lunatics, certified institution, approved home, or other public or charitable institution, that person shall, for the purposes of the provisions of the last foregoing section, be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home, and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive."

it would have specifically so enacted. The words of the sub-section are "the institution" not "any institution." In *Berkshire County Council* v. *Reading Borough Council* (1) it was held that "resides" in s. 69 of the Act of 1913 included residence in a certified institution, and Avory J. said (2): "I cannot doubt that the word 'resides' is used in the same sense in s. 69 as it is used in s. 44," and s. 9 of the Act of 1927 is an amendment of s. 44 of the Act of 1913. "Resides" means "in fact lives": *Stoke-on-Trent Borough Council* v. *Cheshire County Council.* (3) There is a real doubt where Townsend resided, therefore his "place of residence" ought, under s. 44, sub-s. 4, of the Act of 1913, to be determined according to the law relating to poor law settlement.

A. P. Marshall for the respondents. The object of s. 9 of the Act of 1927 was to deal with the position created by *Berkshire County Council* v. *Reading Borough Council.* (1) Since that case institutions may be burdened with the permanent upkeep of persons whom they have admitted as patients. The Legislature realized that that was a hardship; hence s. 9 of the Act of 1927. Therefore in the proper interpretation of that section all institutional residence should be excluded. If the words had been "an" or "any" institution the matter would be beyond doubt. There is no magic about the word "the," and it means "an." There seems no point in excluding all institutions except one. "The" institution only points to the particular one which marks the beginning of the residence which is to be excluded. Sect. 9 adds a new sub-section, and does not merely enlarge the powers of the Secretary of State under s. 44 of the Act of 1913. Sect. 9 speaks of it as a "new sub-section," and begins with the words "Where the order is made by a judicial authority," and does not purport to deal with the powers of the Secretary of State.

LORD HEWART C.J. This is a case stated by justices of the peace for the county of Worcester, and it arises in the

(1) [1921] 2 K. B. 787.
(2) Ibid. 798.
(3) [1915] 3 K. B. 699.

following way: The complaint was preferred by the petitioning officer to the committee for the care of the mentally defective, appointed by the council of the county of Warwick, the respondents in this case, under the Mental Deficiency Act, 1913, s. 44, sub-s. 3, against the appellants, who are the Worcestershire County Council, for that on March 16, 1933, an order was made by a justice for Worcestershire specially appointed under the Lunacy Act, 1890, directing that one Michael Townsend, a defective, should be sent to a certified institution, known as Besford Court Certified Institution in the county of Worcester, and specifying the county of Warwick as the place in which Michael Townsend resided. It was claimed that the liability of the respondents, that is the Warwickshire County Council, should be transferred to the appellants, the Worcestershire County Council, and the court of summary jurisdiction made an order so transferring the liability. The question raised by this case is whether in so doing the justices came to a right determination in point of law.

The facts of the case, although at first blush they appear to be complicated, are really simple. This boy, Michael Townsend, was born in Manchester in 1916. His mother, in the year 1923, when she was last heard of, had no fixed abode. His father had been admitted to the New Cross Institution, Wednesfield, Wolverhampton Union, in Staffordshire, on June 18, 1921, and died in that institution on February 2, 1922, and during the period from February 1, 1922, to January 8, 1923, Mrs. Townsend and her four children, Michael being one of those four, were inmates of the New Cross Institution in Wednesfield. On September 25, 1923, Mrs. Townsend and her children arrived in Kidderminster (Worcestershire) and stayed in a common lodging house until September 29, 1923, on which date they left. The mother deserted three of the children in Kidderminster, and they went to Kidderminster workhouse on September 29, 1923. Those three children included the boy Michael. On November 2 of that year those three children were accepted by Dr. Barnardo's Homes in Birmingham, and were transferred to Father Hudson's Home in Coleshill on November 24, 1923. On April 1, 1925, the boy Michael was admitted to the Coleshill Saint Edward's Roman Catholic elementary school, a school closely connected with Father Hudson's Home in Coleshill in Warwickshire. Afterwards, on account of mental defect, it was recommended that Michael Townsend be admitted to a special school for mentally defective children, and he was, accordingly, admitted to the Besford Special School in Worcestershire, chargeable to the Warwickshire Education Committee, on March 20, 1929. The chargeability of the Warwickshire Education Committee ceased on December 31, 1932, at the end of the school term in which the boy reached the age of sixteen.

In those circumstances, the question arose whether the residence of this unfortunate boy in institutions was to be regarded as residence within the meaning of this Act. The contentions which were put forward on the part of the respondents are concisely stated in the first two: That the justice for Worcestershire was wrong in holding that the boy resided, within the meaning of s. 9 of the Mental Deficiency Act, 1927, in the county of Warwick, and that the Warwickshire County Council was responsible for his maintenance. The reason for that contention is contained in the next paragraph: That by the said s. 9 all institutions, approved homes, or other public or charitable institutions were excluded in arriving at what was a "place of residence" within the meaning of the section.

The contention of the appellants, on the other hand, was that the boy had never acquired a "place of residence" in Kidderminster, and that s. 9 of the statute excluded only the one institution in which the boy resided at the time when the order was made. The argument proceeded that if it had been intended to exclude all institutional residences, the section would have specifically so stated.

In my opinion, the contention of the appellants the Worcestershire County Council was clearly right. One has to look not at other Acts of Parliament which use different language, but at this particular Act of Parliament. The matter stands in this way: Under s. 43 of the Mental Deficiency Act, 1913, there are provisions for the ascertainment of the local authority responsible for providing accommodation in certain cases, and under s. 44 there are provisions for the determination of residence in certain cases, and that section of the Act of 1913 was added to—the term which is used is "amended"—but was in fact added to by s. 9 of the Mental Deficiency Act, 1927. That section provides as follows, in words which, as it seems to me, are free from ambiguity: "Section forty-four of the principal Act"—that is the Act of 1913—"(which relates to the determination of residence) shall be amended by the insertion therein after subsection (2) of the following new subsection." The words "the following new subsection" are a little important, because it might appear at first blush as if the words beginning "(2A)" were a mere amendment of sub-s. 2 in s. 44 of the earlier Act. It is quite clear that they are a substantive addition. The words are: "(2A) Where the order is made by a judicial authority and is in respect of a person in an institution for lunatics, certified institution, approved home, or other public or charitable institution, that person shall, for the purposes of the provisions of the last foregoing section, be deemed to have resided in the place which was his place of residence immediately before he was received into the institution or home, and if for the purposes of or in connection with his reception into the institution or home any place was determined to have been his place of residence, that determination shall be conclusive."

Now the argument which is made on behalf of the respondents, which was made with success in the court below, is that "the institution or home" means any institution or home; and it is quite obvious that if that had been the meaning, nothing would have been simpler than to express it. The words are "the institution or home," and what has to be decided is where the person in the institution was residing immediately before he was received into "the institution." There is nothing in this sub-section to say that residence in any institution shall not be accounted as residence. Our attention has been directed to various statutes in which provisions of that kind are contained. I need not refer to them. They seem to me to afford a commentary upon the provision in this section by way of contrast. They make it clear that where the Legislature intended that any institutional residence should be excluded, plain words were used to express that meaning. Here there are no such words, and the question is the simple question: Where was this boy residing before he was received into "the institution or home," where he was at the time when the order was made by the judicial authority? As was clearly laid down in the year 1921, some years before the Mental Deficiency Act, 1927, became law, residence in an institution is residence in the ordinary sense. In the case of *Berkshire County Council* v. *Reading Borough Council* (1) my brother Avory said: "I cannot doubt that the word 'resides' is used in the same sense in s. 69"—that is of the Act of 1913—"as it is used in s. 44, and if it is used in the same sense, then it contemplates that a person who is living in such an institution as this does reside there. I come to the conclusion, therefore, that this defective woman was residing, within the meaning of this statute, at the institution within the county of Berkshire, and that therefore the decision of the justices was right." The other members of the Court, Darling J. and Salter J., were of the same opinion. The word "resides" is after all only a longer word in statutes of this nature for the word "lives"; and the simple question is: Where was the boy living before he was sent to the institution in which he was at the time when the order was made? I think it is quite obvious that the only answer to that question is, that the boy was living in the county of Warwick at that time, and it matters not that his residence there was in an institution. I think, therefore, that this appeal succeeds, and that the order transferring the liability of the Warwickshire County Council to the Worcestershire County Council was erroneous in point of law and ought to be set aside.

(1) [1921] 2 K. B. 787, 798.

AVORY J. I am of the same opinion, and have very little to add to the exhaustive judgment which my Lord has delivered. The only question in this case is: Where was this person, Michael Townsend, residing at the time when he was sent to the institution known as Besford Court Certified Institution in the county of Worcester? As soon as it is established, as it was established in the case of *Berkshire County Council* v. *Reading Borough Council* (1), that for the purposes of these Acts of Parliament a person may be deemed to reside in a charitable institution, it becomes clear, in my opinion, that at the time in question this person was residing in Father Hudson's Home in Coleshill, Warwickshire.

I have only one other thing to add. Reference has been made during the argument to s. 69 of the Mental Deficiency Act, 1913, which provides: "The time during which a defective is detained in an institution or resides in an approved home under this Act shall for all purposes be excluded in the computation of time mentioned in section one of the Poor Removal Act, 1846, as amended by any subsequent enactment." Sect. 69 only comes into operation in the case of doubt as to where a person resides, it being provided in s. 44, sub-s. 4, of the Act of 1913 that "In the case of doubt as to where a person resides the expression 'place of residence' in this section shall be construed as the county or county borough (as the case may be) in which the person would, if he were a pauper, be deemed to have acquired a settlement within the meaning of the law relating to the relief of the poor." In other words, s. 69 was only introduced into this Act in order to bring it into conformity with the Poor Removal Act, 1846, in cases where there is a doubt as to where a person resides. In view of the above decision (1), in my opinion this is not a case of any doubt at all. There is no room for doubt, after that decision, as to where this person was in fact residing at the material time. I agree, therefore, with the conclusion that this appeal should be allowed.

TALBOT J. I am of the same opinion, and I am bound

(1) [1921] 2 K. B. 787.

to say the case appears to me to be an exceedingly plain one. The respondents' case and the decision of the justices rests on the proposition that being in the home at Coleshill, where in fact this boy was, just before he was admitted into the Besford School, does not make that home a place of residence within the meaning of s. 9 of the Act of 1927. That contention was supported on two grounds, more vigorously on the second than on the first. The first ground appeared to be that this school was something in the nature of a home provided partly, at any rate, for the accommodation of boys afflicted in this way, and that that made being or living there not residence. That is disposed of by the case of *Berkshire County Council* v. *Reading Borough Council* (1), as to which I would only say that I am rather surprised that the matter there was ever contested.

The other argument was that there were a number of statutes which excluded institutions of this class from the category of places in which residence was possible. It certainly cannot be said that that statement is true of all statutes dealing with institutions. I notice that in point of fact, on a closely analogous problem under s. 43, sub-s. 1, of this very Act, the Mental Deficiency Act, 1913, which was one of the Acts which the Court was construing in the case of *Berkshire County Council* v. *Reading Borough Council* (1), the word "reside" was quite clearly held to include living in an institution of this sort. But supposing it were true that in all the analogous cases provision was made that residence in an institution was not to count for this purpose, that would only make the exception contained in the Act of 1927 the more conspicuous, because it is quite plain that there is in that section a total absence of any such words as were read to us from several Acts, by which Parliament in each case made clear its intention that in that particular connection "residence" must be residence somewhere else; and, indeed, the last Act which was quoted—and I dare say it is true of many others—shows quite clearly that residence in an institution is "residence" as one would expect, unless

(1) [1921] 2 K. B. 787.

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WORCESTERSHIRE COUNTY COUNCIL v. WARWICKSHIRE COUNTY COUNCIL.

Talbot J.

there is some special legislation which says that in that particular case it is not. Sect. 90, sub-s. 6, of the Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), says this: "In determining for the purposes of this section the place of residence of a child or young person, any period during which he resided in any place as an inmate of a school or other institution" and so on. That is to say, it is perfectly correct English and perfectly good sense to say that a child does "reside" in a place of this kind. If Parliament wishes it should not have its ordinary meaning it says so, as it did in the sub-section I have just read, because it goes on to say that that period is to be disregarded for the purposes of that Act. It seems to me, therefore, that there is no ground at all on which the decision of the justices in this case can be supported, and I agree with my Lord that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for C. H. Bird, Worcester.*

Solicitors for respondents: *Taylor, Jelf & Co., for H. M. Blenkinsop, Warwick.*

W. L. L. B.

PHILLIPS *v.* PARNABY.

1934
May 16.

Weights and Measures—Sale of Coal—Quantity delivered less than quantity expressed in ticket or note—Notice of date and nature of alleged offence not served on defendant—Competence of prosecution—" Retailer "—Weights and Measures Act, 1889 (52 *&* 53 *Vict. c.* 21), *s.* 21, *sub-s.* 2*—Sale of Food* (*Weights and Measures*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 12, *sub-s.* 6 ; *s.* 15, *sub-s.* 1.

The appellant was convicted by justices of delivering a quantity of coal which was less than that expressed in the weight ticket, contrary to s. 21, sub-s. 2, of the Weights and Measures Act, 1889. No notice in writing of the date and nature of the alleged offence had been served on or sent by registered post to the appellant in accordance with s. 12, sub-s. 6, of the Sale of Food (Weights and Measures) Act, 1926. The coal was delivered under an antecedent contract covering a number of deliveries and was purchased for consumption in or by a steam roller belonging to the purchasers :—

Held, that, as s. 15, sub-s. 1, of the Act of 1926 provided that that Act was to be construed as one with the Weights and Measures Acts, 1878 to 1926 (which included the Weights and Measures Act, 1889), and as there was no manifest discrepancy between the provisions of s. 12, sub-s. 6, of the Act of 1926, and s. 21, sub-s. 2, of the Act of 1889, the conviction was bad for failure to fulfil one of the conditions precedent to a prosecution laid down by s. 12, sub-s. 6.

Hart v. *Hudson Bros., Ld.* [1928] 2 K. B. 629 applied.

Held, further, that, as the coal was sold for consumption by the purchaser, the appellant was a " retailer " within s. 12, sub-s. 6, of the Act of 1926, his position in that respect not being affected by the fact that the coal was delivered under an antecedent contract.

Treacher & Co., Ld. v. *Treacher* [1874] W. N. 4 applied.

CASE stated by Pembrokeshire Justices.

At a court of summary jurisdiction sitting at Newport, Pembrokeshire, an information was preferred by the respondent, John Henry Parnaby, an inspector of weights and measures of the Pembrokeshire County Council, under s. 21, sub-s. 2, of the Weights and Measures Act, 1889 (1),

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(1) By the Weights and Measures Act, 1889, s. 21 : " (1.) Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note " according to the prescribed form.

" (2.) If . . . . the quantity of coal delivered is less than the quantity expressed in the ticket or note, the seller of the coal shall be liable to a fine . . . ."

By the Sale of Food (Weights and Measures) Act, 1926, s. 12, sub-s. 6 : " A prosecution in respect of an

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against the appellant, Simon John Phillips, for that he, on October 4, 1933, at Glandwr Road, Llanfyrnach, Pembrokeshire, being the seller of a quantity of coal exceeding two hundredweight, to wit, one ton, nine hundredweight, delivered by means of a vehicle to the Pembrokeshire County Council, the purchasers thereof, unlawfully did deliver to the Council a quantity of coal less than the quantity expressed in the note delivered to the servant of the council.

On the hearing of the information the following facts were proved:

The appellant was a coal and general merchant at Crymmych, Pembrokeshire. On October 4, 1933, one Dewi Owen Evans, an employee of the county council, for and on behalf of the council, ordered from the appellant two tons of coal to be consumed in or by a steam roller the property of the council. The quantity of coal expressed to be sold and delivered in the weight ticket was one ton nine hundredweight. The quantity actually delivered was one ton five hundredweight and three-quarters. The appellant was present and was given a reasonable opportunity to check the weight when the coal was re-weighed. No notice in writing of the date and nature of the alleged offence had been served on or sent by registered post to the appellant within seven days after the alleged commission of the offence, as specified in s. 12, sub-s. 6, of the Sale of Food (Weights and Measures) Act, 1926. (1) In the course of the appellant's evidence it was proved that the appellant had a

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offence by a retailer under this Act . . . . shall not be instituted after the expiration of twenty-eight days from the time when the offence was committed, nor unless within seven days after the alleged commission of the offence notice in writing of the date and nature of the alleged offence has been served on or sent by registered post to the defendant, nor unless in the case of any alleged deficiency the person against whom the allegation is made has been given reasonable opportunity to check the weight, measure or number of the article or articles in respect of which such allegation is made."

Sect. 15, sub-s. 1, of the Act of 1926 provides: "This Act . . . . shall be construed as one with the Weights and Measures Acts, 1878 to 1926, and shall be included amongst the Acts which may be cited as the Weights and Measures Acts, 1878 to 1926."

(1) See note (1) ante, p. 299.

contract with the council under which the coal was ordered and supplied, but no evidence was given as to the nature and terms thereof.

The justices formed the opinion that s. 12, sub-s. 6, of the Act of 1926 was framed in the alternative, and, as the appellant had been given an opportunity of checking the weight when the coal was re-weighed, it was not necessary for notice in writing of the date and nature of the alleged offence to be served on him. They also found that, as the coal was sold by contract, it was not purchased by the council from a retailer.

The justices therefore found the appellant guilty and fined him 10*s.*

Moelwyn Hughes for appellant. The justices were wrong. By s. 15, sub-s. 1, of the Sale of Food (Weights and Measures) Act, 1926, that Act is to be "construed as one with the Weights and Measures Acts, 1878 to 1926," which include the Weights and Measures Act, 1889. As there is no manifest discrepancy between the provisions of s. 12, sub-s. 6, of the Act of 1926 (which prescribes certain conditions precedent which must be fulfilled before a prosecution under that Act can validly take place) and s. 21, sub-s. 2, of the Act of 1889 (under which the appellant was convicted), s. 12, sub-s. 6, of the Act of 1926 applies to the prosecution of the appellant: *Hart* v. *Hudson Bros., Ld.* (1) All the conditions precedent laid down in s. 12, sub-s. 6, must be fulfilled and here one of them—namely, service on the appellant of notice in writing of the date and nature of the alleged offence—was not complied with. Therefore, the prosecution and conviction were bad. The appellant was a "retailer" within s. 12, sub-s. 6, as the coal was sold for consumption by the purchaser and not for re-sale or use in some process of treatment or manufacture, and consequently he was entitled to the protection of the sub-section. The existence of a contract under which the delivery was made is immaterial.

J. L. Willis. The conviction was good. If the appellant

(1) [1928] 2 K. B. 629.

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wished to secure the protection of s. 12, sub-s. 6, the onus was on him to prove that he was a "retailer" and not on the prosecution to prove that he was not: see Summary Jurisdiction Act, 1848, s. 14; Summary Jurisdiction Act, 1879, s. 39, sub-s. 2; *Roche* v. *Willis.* (1) That onus the appellant failed to discharge and in fact he was not a retailer as the coal was supplied by him under a contract covering a number of deliveries. [He referred to *Treacher & Co., Ld.* v. *Treacher.*] (2) Moreover, s. 12, sub-s. 6, of the Act of 1926 applies only to the sale of articles of food, the conditions governing the sale of coal being specifically provided for in Part II. of the Act of 1889. That is a discrepancy which prevents s. 12, sub-s. 6, being construed as one with s. 21, sub-s. 2, of the Act of 1889.

Moelwyn Hughes replied.

LORD HEWART C.J. I have come to the conclusion, although not without hesitation, that this appeal ought to be allowed. On behalf of the respondent it has been argued that s. 12, sub-s. 6, of the Sale of Food (Weights and Measures) Act, 1926, relates only to the retail sale of articles of food and does not apply to the sale of coal. In my opinion that contention is wrong. There is no manifest discrepancy between the provisions of s. 12, sub-s. 6, of the Act of 1926 and s. 21, sub-s. 2 of the Weights and Measures Act, 1889. It seems to me, therefore, that this case is concluded, so far as that point is concerned, by the application of the decision of this Court in *Hart* v. *Hudson Bros., Ld.* (3) where reference is made to the words of Lord Selborne L.C. in *Canada Southern Ry. Co.* v. *International Bridge Co.* (4) Lord Selborne, referring to two statutes which were there in question, said: "It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

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(1) Not yet reported.

(2) [1874] W. N. 4.

(3) [1928] 2 K. B. 629.

(4) (1883) 8 App. Cas. 723, 727.

In the present case it is quite clear that the Legislature has thought fit to provide, by s. 15 of the Act of 1926, that that Act is to be construed as one with the Weights and Measures Acts, 1878 to 1926, and that series of Acts includes the Weights and Measures Act, 1889. As I have already said, there is no manifest discrepancy between the provisions of the sub-sections with which we are concerned here so as to prevent effect being given in a proper case to s. 12, sub-s. 6, of the Act of 1926 where what is being dealt with is the sale, not of food, but of coal.

The justices held that the provisions of s. 12, sub-s. 6, are alternative. That view is erroneous and indeed it has now been abandoned. The provisions of s. 12, sub-s. 6, are cumulative and all the conditions laid down in it must be fulfilled in the case of a prosecution to which it relates.

The only remaining point is whether this prosecution was in respect of an offence by a " retailer " within the meaning of s. 12, sub-s. 6. No doubt, where a defendant seeks to obtain the benefit of the provisions of the sub-section he must prove by evidence that he is a retailer. Here it was shown that the appellant was a retailer. He was proved to be a " coal and general merchant." He had an order for two tons of coal. It is true that he had a contract with the county council under which the coal was supplied. The case states that no evidence was given as to the nature or terms of that contract. The prosecution seems to have been content to leave the matter there and the justices seem to have been similarly content, because they say that, in their opinion, it was not necessary for notice in writing of the date and nature of the alleged offence to be served on the appellant " because the coal was sold by contract and was not purchased from a retailer." Those last words suggest that an antecedent contract of any kind is sufficient to take a sale out of the category of retail sales. That view cannot be supported. It is no doubt to be regretted that this statute does not define what is a " retailer " for the purposes of the statute, but if the words of Bacon V.C. in *Treacher & Co., Ld.* v. *Treacher* (1) are to be applied, the appellant was clearly a retailer. " As a general rule," said Bacon V.C. " ' wholesale ' merchants dealt only with persons who bought to sell again, whilst ' retail ' merchants dealt with consumers." Here it is found as a fact that the two tons of coal which were ordered from the appellant were to be consumed " in or by a steam-roller, the property of the County Council."

In that state of the evidence, I think, although not without hesitation, that the appellant was entitled to take the point that one of the conditions imposed by s. 12, sub-s. 6, of the Act of 1926 had not been fulfilled. I venture to repeat what was said in *Hart* v. *Hudson Bros., Ld.* (2)—namely, "what might perhaps be said is that these words of Walton J. in *Willingale* v. *Norris* (3) are no less applicable here than they were there : ' This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes '." One is tempted to wonder whether the Legislature consciously, in s. 15 of the Act of 1926, applied the provisions of that statute to such a sale as that in this case. In terms, however, that section says that the two Acts are to be read together, and, in view of that, I do not think that there is any course open to us except to apply the provisions of s. 12, sub-s. 6, to this case.

Therefore, this appeal must be allowed and the conviction of the appellant must be quashed.

TALBOT J. I am of the same opinion for the reasons given by my Lord.

MACNAGHTEN J. I also agree.

Appeal allowed.

Solicitors for appellant : *Amphlett & Co., for Roy Evans & Nell, Newcastle Emlyn, Carm.*

Solicitors for respondent : *Smith, Rundell, Dods & Bockett, for R. A. Wheatley, Haverfordwest.*

(1) [1874] W. N. 4.
(2) [1928] 2 K. B. 629, 635.
(3) [1909] 1 K. B. 57, 66.

G. F. L. B.

STAFFS MOTOR GUARANTEE, LIMITED *v.* BRITISH WAGON COMPANY, LIMITED.

1934
April 17, 18, 19.

[1933. S. No. 158.]

Hire-purchase—Sale of motor lorry—Letting of lorry by buyer to seller on agreement purporting to be for hire-purchase—Fraudulent second sale by seller to another innocent buyer—Which buyer entitled to Lorry—Agreement whether in the circumstances a hire-purchase agreement or a bill of sale—Second sale whether by a mercantile agent or a bailee—Second sale whether by a seller in possession or a bailee—Factors Act, 1889 (52 *&* 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1*—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 25, *sub-s.* 1.

H., a dealer in motor vehicles, and the defendants, a finance company, entered into a transaction for the sale of a motor lorry by H. to the defendants and the letting of the lorry by the defendants to H. on an agreement in the form of a hire-purchase agreement. The transaction was carried out by means of the printed forms used by the defendants in their business, which were more appropriate to a case in which they bought a vehicle and let it on hire-purchase to a third party, than to the present case. H. being in possession of the lorry then fraudulently sold it to the plaintiffs, who were not aware of the previous transaction between H. and the defendants. The payments due from H. to the defendants under the hire-purchase agreement between them having fallen into arrear, the defendants resumed possession of the lorry and refused to deliver it to the plaintiffs at their request. The plaintiffs thereupon brought an action against the defendants claiming delivery up of the lorry or damages for its detention :—

Held, (1.) that in the circumstances the transaction between H. and the defendants was in fact what it purported to be, and that the agreement between them as to the letting of the lorry was a valid hire-purchase agreement and could not be treated as a bill of sale to secure the repayment of a loan by the defendants to H.:

Yorkshire Railway Wagon Co. v. *Maclure* (1882) 21 Ch. D. 309 followed;

(2.) that H. was not in possession of the lorry as a "mercantile agent" within the meaning of the Factors Act, 1889, s. 2, sub-s. 1, but as a bailee, and therefore that the sale of the lorry by him to the plaintiffs was not rendered valid as against the defendants by that sub-section :

Oppenheimer v. *Frazer and Wyatt* [1907] 1 K. B. 519, 527; [1907] 2 K. B. 50, observation adopted;

(3.) that H., after the transaction between him and the defendants had been completed by the agreement for hire-purchase, was not in possession of the lorry as a person who "having sold goods, continues or is in possession of the goods" within the meaning of the Sale of Goods Act, 1893, s. 25, but as a bailee, and therefore that the delivery or transfer by him of the lorry under the sale by him to the plaintiffs

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Staffs Motor Guarantee, Ld. v. British Wagon Co.

had not, by virtue of that section, the same effect as if it had been authorized by the defendants, and was not thereby rendered valid as against the defendants:

Mitchell v. *Jones* (1905) 24 N. Z. L. R. 932 followed;

And that the plaintiffs were not entitled to the relief which they claimed.

Action tried by MacKinnon J. without a jury.

Albert Thomas Heap carried on business under the style of Buckley Brothers as a dealer in motor cars of certain makes including a make known as the Commer car, and as a garage proprietor, at Stoke-on-Trent or Hanley. Heap was the legal owner of a Commer six-ton lorry, and he applied to the British Wagon Company, of Rotherham, Yorkshire, the defendants, who were a finance company, to enter into a transaction of the usual type to buy the lorry from him and let it on hire-purchase to a company called the Thorley Transport Company, but the defendants did not accede to that proposal. Eventually, however, in April, 1932, an arrangement was made between Heap and the defendants that Heap should sell the lorry to the defendants, and that they should then let it to him on hire, giving him liberty to sub-let it to the Thorley Transport Company on hire-purchase; and the defendants sent to Heap for completion and return their usual printed forms of proposal, hiring agreement, invoice, and plating certificate. Pursuant to that arrangement Heap agreed to sell the lorry to the defendants for 900*l.* and returned to them these documents duly completed. The proposal form was adapted to the ordinary case in which the intending hire-purchaser was recommended by a third party, but when filled up in the present case it became a recommendation of Heap by himself. The hire-purchase agreement, which was dated May 2, 1932, and made between the defendants (therein called "the owners") and Heap (therein called "the tenant"), provided (clause 1) that the defendants should hire to H. and that he should take on hire the lorry for seventeen months from the date of delivery; (clause 2) that H. should pay to the defendants for the hire of the lorry an initial rent of 300*l.* and seventeen monthly rents each of 37*l.* 6*s.* 8*d.*, the first payable one month after delivery ; (clause 5) that in default of punctual payment of any moneys payable thereunder it should be lawful at any time or times thereafter for the defendants to terminate the hiring forthwith and to seize and take the vehicle, and such seizure or taking of the vehicle and such termination of the hiring should be without prejudice to any right or cause of action of or by or on the part of the defendants then accrued or to any claim for damages for breach of the agreement ; (clause 6) that the agreement should not be nor be construed to be a purchase or an agreement for the purchase of the vehicle by H., but on the due completion of the full term of the hiring and on payment of all rent and other moneys payable thereunder H. should have the option of purchasing the vehicle at the price of 37*l.* 6*s.* 8*d.* ; and that unless and until the purchase price had been paid the vehicle should remain the absolute property of the defendants ; and (clause 7) that the defendants should have the right to place their name-plate or other distinguishing mark of their ownership on the vehicle. The defendants thereupon sent Heap their cheque for 900*l.*, and Heap sent the defendants his cheque for 300*l.* for the initial rent. The defendants' name-plate was never in fact affixed to the lorry. Heap afterwards informed the defendants that he could not sub-let the lorry to the Thorley Transport Company, but that a Mr. E. R. Pettitt was willing to enter into a hire-purchase agreement for it, and Heap asked the defendants whether they would cancel the hire-purchase agreement between them and himself and enter into a hire-purchase agreement with Mr. Pettitt. The defendants declined to cancel the agreement between themselves and Heap, but granted him permission to sub-let the lorry to Mr. Pettitt without prejudice to their agreement with Heap. Pettitt knew nothing of the transactions that had taken place between Heap and the defendants. Pettitt saw the lorry several times in Heap's garage or yard where it had remained, thought it would suit him, and desired to get and use it.

In June, 1932, Heap and Pettitt went to the Staffs Motor Guarantee, Ld., the plaintiffs, Heap representing to Pettitt and to the plaintiffs that the lorry was still his, as it had been before the arrangement between him and the defendants, and suggesting that he should sell the lorry to the plaintiffs and that the plaintiffs should let it on hire-purchase to Pettitt. The plaintiffs thereupon, in entire ignorance of Heap's previous dealing with the defendants in regard to the lorry, sent to Heap and Pettitt their ordinary printed forms for completion and return. Pettitt signed a proposal form offering to enter into a hire-purchase agreement with the plaintiffs for the lorry. Heap signed an attached reference form giving particulars regarding Pettitt as the proposing hire-purchaser, and stating that the lorry was the property of Heap or that he had authority to sell it, and that he thereby offered to sell it to the plaintiffs for 967*l.*, of which 300*l.* should be paid as a deposit and the balance by eighteen equal monthly payments. The plaintiffs acceded to these proposals, and it was further arranged that Pettitt as hire-purchaser should pay to the plaintiffs an initial rent of 300*l.*, which should be paid not in cash but by his giving to them a Saurer lorry belonging to him, and that the 300*l.* deposit should be paid by the plaintiffs to Heap by their giving that lorry to him. The hire-purchase agreement between the plaintiffs (therein called "the owners") and Pettitt (therein called "the hirer") was dated June 27, 1932, and provided that the plaintiffs agreed to let the Commer lorry and that Pettitt agreed to hire it at a rent payable by the latter as to 300*l.* thereof by an initial payment, and as to the balance by eighteen equal monthly payments, these monthly payments being equal in amount to those to be made by the plaintiffs to Heap. In pursuance of these agreements Pettitt handed over the Saurer lorry to Heap, and the plaintiffs paid 600*l.* net to Heap, which was accepted by him in discharge of their liability to him. Pettitt then took away the Commer lorry and used it in his business.

Heap paid the monthly instalments of hire due under the hire-purchase agreement between the defendants and himself until near the end of 1932, but in the beginning of 1933 he got into financial difficulties and ceased to pay them. The defendants were thereupon minded to exercise their rights to re-take possession of the Commer lorry. Believing as they did that Heap had sub-let the lorry to Pettitt under his arrangement with themselves, they therefore, about the end of January, 1933, went to Pettitt's premises, found the lorry there, claimed possession of it, and eventually took it away. The plaintiffs afterwards demanded the lorry from the defendants, but the defendants refused to deliver it to them.

On April 12, 1933, the plaintiffs brought the present action against the defendants. They stated in their amended statement of claim (para. 1) that on June 27, 1930, they purchased from Heap the Commer lorry for 600*l.*; that Heap was at that date the owner of the lorry; that alternatively he was a mercantile agent in possession of the lorry with the consent of the owners (the defendants) and the plaintiffs purchased in good faith and without notice of any want of authority in Heap to make the sale: see Factors Act, 1889, s. 2, sub-s. 1 (1); that in the further alternative Heap was at that date a person who had sold the lorry and had continued or was in possession thereof, and the plaintiffs bought and received the same in good faith and without notice of the previous sale: see Sale of Goods Act, 1893, s. 25, sub-s. 1 (1); and that in the still further alternative Heap was the defendants' agent to dispose of the lorry; (para. 2) that on June 27, 1932, after the sale in para. 1 referred to, the plaintiffs let the lorry to Pettitt under the above mentioned hire-purchase agreement of that date; (para. 3) that on and after that date and before March 9, 1933, Pettitt had committed a breach of that hire-purchase agreement in acknowledging the ownership of the defendants and the plaintiffs were entitled to possession of the lorry; and (para. 4) that the defendants wrongfully took possession of the lorry and converted it to their own use; and that alternatively they failed and refused to deliver it to the plaintiffs on demand and wrongfully detained it; and that the plaintiffs claimed

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(1) The section so far as material is set out below in the judgment of MacKinnon J.

(*a*) an order for the delivery up of the lorry and damages for its detention, and (*b*) 600*l*. damages for conversion.

The defendants in their amended defence stated (para. 1) that, save that it was admitted that they were at all material times the owners of the Commer lorry, every allegation in para. 1 of the amended statement of claim was denied; that Heap was not the owner of the lorry as alleged, nor was he in possession of it as a mercantile agent with consent of the defendants or at all; and that the remaining allegations in the amended statement of claim were also specifically denied; and (para. 2) that, save that it was admitted that the defendants had taken possession of the lorry, and had refused to deliver it to the plaintiffs, no admissions were made as to any of the matters alleged in paras. 2, 3 or 4 of the amended statement of claim; and that the plaintiffs' alleged right of possession of the lorry was denied; and that the defendants specifically denied that such taking of possession by themselves was wrongful or that they had detained the lorry wrongfully.

The action was tried by MacKinnon J. without a jury, on April 17, 18 and 19, 1934.

A. A. Pereira for the plaintiffs.

Gordon Alchin for the defendants.

MACKINNON J. This is one of those troublesome cases in which one or other of the two litigants must suffer by the fraudulent conduct of a third party, and the question is which of them should bear the loss. There is little dispute, if any, about the main facts, and though there may be some slight uncertainty as to several dates that is not of any material importance. [His Lordship stated the facts substantially as above set out, and continued as follows:] On these facts arise questions of law which I think are by no means easy.

The plaintiffs put their claim, first, on the ground that the document signed on May 2, 1933, by Heap and the defendants, purporting to be a hire-purchase agreement, ought on the whole of the facts to be treated not as a hire-purchase agreement but as a bill of sale. They say that the transaction in its true nature was a mere loan of 600*l.* by the defendants to Heap to be repaid by certain instalments, and that by virtue of this so-called hire-purchase agreement a security was given on the lorry by Heap to the defendants with power to the defendants to seize it in order to enforce their debt. The question how a transaction of this sort ought to be regarded has been discussed in a number of cases where the facts were somewhat similar to those of the present case, and some of them have been decided one way and some another. The contrast between the two classes of cases is illustrated by *Yorkshire Railway Wagon Co.* v. *Maclure* (1) on the one hand, where it was held that the transaction was not void but was genuine, and by *In re Watson. Ex parte Official Receiver* (2) on the other hand, in which it was held that the transaction was a mere loan with a granting as security of a chattel remaining in the possession of the borrower. I have to make up my mind into which of these classes or types of case this one falls, and I come to the conclusion that it falls on the side of the line on which *Yorkshire Railway Wagon Co.* v. *Maclure* (1) is found. I think that the transaction here in question was a genuine purchase of the lorry by the defendants and a genuine re-letting of it to Heap. It was done in this way, I think, because a convenient method was thus found by the defendants of making use of their printed agreements, in lieu of the transaction taking the form that Heap had suggested—namely, a hire-purchase agreement to the Thorley Transport Company, and a guarantee of payment by that company from Heap. It seems to me to be highly likely that the defendants adopted this course because they supposed that if they departed from their printed forms it might be necessary to employ a solicitor to prepare the proper guarantee, and that from a business point of view the more convenient way of carrying out that transaction would be to make use of their ordinary documents. The transaction was, I think, in its essence a genuine transaction of the kind which is properly carried out by these finance companies—namely, the provision to the dealer in such vehicles of the capital sum necessary to supplement the inability of his customer to provide that sum. In my judgment the transaction between Heap and the defendants is not one to be impugned and set aside under the Bills of Sale Acts.

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(1) 21 Ch. D. 309.

(2) (1890) 25 Q. B. D. 27.

Then, assuming that the transaction between Heap and the defendants was valid and that they purchased the lorry from him, the plaintiffs put their claim on one or other of two alternative grounds. The first of these alternative grounds is that this case falls within the Factors Act, 1889, s. 2, sub-s. 1: " Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." The plaintiffs say that the defendants entrusted the possession of the lorry to Heap, who was a mercantile agent for the sale of second-hand lorries, and that they, the plaintiffs, in good faith and without any notice of his want of authority, entered into a contract with him for the purchase of the lorry, and, therefore, they claim that they have a good title to the lorry as against the defendants pursuant to the provisions of that section. There was no doubt some evidence that Heap did deal in second-hand motor vehicles as an ordinary seller of them. I will suppose that, if an ordinary owner of a motor-car had brought his car to Heap and asked him to sell it for him and Heap had sold it to some one at a lower price than that authorized by the true owner or otherwise not in accordance with his instructions, the purchaser from Heap would be entitled under the section which I have quoted to claim as against the true owner. I think, however, that it has rightly been pointed out on behalf of the defendants that there would be this difficulty in the way of the plaintiffs' assertion of that claim, that if the transaction between the defendants and Heap was a genuine transaction—and the plaintiffs' claim in this respect arises on that basis—then the lorry had been sold by Heap to the defendants and had been entrusted by the defendants to Heap not as a mercantile agent dealing in or selling motor vehicles, but to Heap as a hirer of the car and therefore as its bailee. In these circumstances I do not think that it is open to the plaintiffs to say that the defendants entrusted the car to Heap as a mercantile agent. In *Oppenheimer* v. *Frazer and Wyatt* (1) Channell J., in examining the meaning of the Act of 1889, said (2): "It seems to me that the true rule is that where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled." I observe that Sir Mackenzie Chalmers, the learned draftsman of the Sale of Goods Act, 1893, in his comment on this section, makes the same suggestion and illustrates it by what seems to be a very forcible example: "Suppose a house were let furnished to a man who happened to be an auctioneer. Could he sell the furniture by auction and give a good title to the buyers? Surely not." (3) That, of course, is an extreme case, but, I think, the same principle applies here. Because one happens to entrust his goods to a man who is in other respects a mercantile agent, but with whom he is dealing not as a mercantile agent but in a different capacity, I do not think that it is open to a third party who buys the goods from that man to say that they were in his possession as a mercantile agent and that therefore he had power to sell them to a purchaser and so give him a good title to them. The claimant must be able to assert not only that the goods were in the man's possession as a mercantile agent, but also that they were entrusted by the owner to him as a mercantile agent. As Channell J. said, it is the consent of the owner of the goods to the possession of them by the mercantile agent as a

(1) [1907] 1 K. B. 519; [1907] 2 K. B. 50. (2) [1907] 1 K. B. 519, 527.

(3) Chalmers' Sale of Goods Act, 1893, 11th ed., p. 176.

mercantile agent that is the important part of the matter. I therefore think that this ground of the plaintiffs' claim fails.

The other alternative ground of claim which is relied upon by the plaintiffs also depends upon the possession of the lorry by Heap at the time when the plaintiffs made their contract with him. That ground is said to be provided by the Sale of Goods Act, 1893, s. 25, sub-s. 1: "Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same." It is said that in this case Heap having sold the lorry to the defendants continued and was still in possession of it after the sale within the wording of that sub-section, and therefore that the sale of it by him to the plaintiffs enabled them to claim a good title to it. I think this method of putting the plaintiffs' claim is subject to practically the same difficulty as stands in the way of the plaintiffs when they seek to base their claim on the Factors Act, 1889. That difficulty is that Heap's possession of the lorry at the time when the plaintiffs made their bargain with him was not the possession of a seller who had not yet delivered the article sold to the buyer, but was the possession of a bailee under the hire-purchase agreement, held by me to be valid, into which he had entered with the defendants. It is a curious fact that apparently no case has arisen in the English Courts upon the point now taken under this sub-section. I have, however, had cited to me a case on the point of *Mitchell* v. *Jones* (1) which arose in the Courts of New Zealand. The facts of that case were that the owner of a horse sold it to a buyer and obtained it back from him on lease, and then, having the horse in the capacity of lessee, sold it to a second buyer who took it in good faith and without notice of the former sale. The first buyer claimed the horse or its value from the second buyer, who relied upon s. 27, sub-s. 1, of the New Zealand Sale of Goods Act, 1895, which is identical with s. 25, sub-s. 1, of the English Act. The case was apparently tried originally in a court of summary jurisdiction, and there was an appeal from that court to a single judge, who thought the point so difficult that he caused it to be re-argued before a court of five judges, who decided in favour of the claimant. The headnote to the report of the case concludes thus : " Held, that the respondent (the second buyer) was not protected by the above sub-section, and that the appellant could recover the horse or its value from the respondent." In the course of the judgment which he delivered in the case Stout C.J. said (1) : " The point turns on how the words ' or is in possession of the goods ' in the sub-section are to be construed. It is contended by Mr. Levi that these words mean that if the seller of the goods delivers them to a buyer and the buyer accepts them, and afterwards the seller gets them back on a new contract in the nature of a bailment, the seller can sell the goods to a third person and give a good title to them, provided the third person acts bona fide in the transaction. In my opinion that is not the meaning of the section. The meaning is—first, that if a person sells goods and continues in possession, even though he has made a valid contract of sale, provided that he has not delivered them, he may to a bona fide buyer make a good title ; and, secondly, the putting-in of the words ' or is in possession of the goods ' was meant to apply to a case of this character : If a vendor had not the goods when he sold them, but they came into his possession afterwards, then he would have possession of the goods, and if he sold them to a bona fide purchaser he could make a good title to them. He would be in the same position as if he had continued in possession of the goods when he made his first sale. In such a case as that he could make a good title to a bona fide purchaser. That is not this case. In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer.

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(1) 24 N. Z. L. R. 932.

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(1) 24 N. Z. L. R. 935.

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STAFFS MOTOR GUARANTEE, LD. v. BRITISH WAGON CO.

MacKinnon J.

The relationship, therefore, of buyer and seller between them was at an end. It is true that the seller got possession of the goods again, but not as a seller. He got the goods the second time as the bailee of the buyer, and as the bailee he had no warrant, in my opinion, to sell the goods again, nor could he make a good title to them to even a bona fide purchaser." I think that that reasoning is sound, that the same principle ought to apply under the words of the identical provision of the English Act, and that the decision in that case applies to the facts of this case.

The result is, I think, that the claim of the plaintiffs fails. I may add that I am sorry for them, as I am for others who have had dealings with Mr. Heap in these transactions, but unfortunately one side or other must suffer by reason of his wickedness, and in my judgment it is the plaintiffs who have to bear the burden.

There must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Firth & Co., for Hunt & Woolliscroft, Hanley.*

Solicitors for defendants: *G. H. Drury, for Pashley & Hodgkinson, Rotherham, Yorks.*

J. R.

SIMPSON (H.M.'s INSPECTOR OF TAXES) *v.* GRANGE TRUST, LIMITED.

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May 2, 3.

Revenue—Income Tax—Investment Trust Company—Management expenses—Claim to relief—Company not assessable under Case I. of Sch. D—Limitation on amount of relief—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 33, *sub-s.* 1.

The Income Tax Act, 1918, s. 33, sub-s. 1, provides: "Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Schedule D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that—(*a*) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules":—

Held (affirming the decision of Finlay J.), that the limit imposed by proviso (*a*) to the relief given by sub-s. 1 only applied to a company or bank of the kind specified in the sub-section whose profits could at the option of the Crown have been charged to tax under Case I. of Sch. D.

Dictum of Lord Skerrington in *Rosyth Building & Estates Co., Ld.* v. *Rogers* (1921) 8 Tax Cas. 11 approved.

APPEAL from a decision of Finlay J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, under the Income Tax Act, 1918, s. 33, sub-s. 2, and s. 149.

The Commissioners for the Special Purposes of the Income Tax Acts, on December 15, 1932, heard the claim of The Grange Trust, Ld., hereinafter called "the company," for relief, under s. 33 of the Income Tax Act, 1918, for the year 1931–32, in respect of its expenses of management.

The company's claim for relief under s. 33 had been objected to by the inspector of taxes on the ground that proviso (*a*) of s. 33, sub-s. 1, applied to this claim and that as a result no relief was due.

The relevant provisions of s. 33, sub-s. 1, are as follows :—

"33. (1.) Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Schedule D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year :

"Provided that—(*a*) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules."

The company, which was incorporated in 1926, carried on the business of an investment trust company. It was admitted by the inspector of taxes that the company was not carrying on a trade the profits of which were assessable under Case I. of Sch. D.

The company's year of account ends on May 31. The management expenses of the company for the year ended April 5, 1932, arrived at by aggregating one-sixth of the expenses for the year ended May 31, 1931, and five-sixths of the expenses for the year ended May 31, 1932, amounted to 2294*l.*, and the company's claim was for repayment of the sum of 573*l.* 10*s.*, being the tax at 5*s.* in the £ on 2294*l.*

The receipts of the company were derived from shares and bonds of English and foreign companies, and from interest on state and municipal loans. Nearly the whole of the receipts were taxed by deduction. The greater part of such receipts fell within the charge under Sch. D, but about 15 per cent. fell under Sch. C.

If the company's profits had been charged in accordance with the rules applicable to Case I. of Sch. D, on the basis of no tax having been deducted at the source, the amount of the tax which would have been paid for the year 1931–32, based on the profits for the company's year ended on May 31, 1930, would have been tax on a sum of 48,048*l*. The amount of tax actually paid by the company (by deduction and direct assessment) for the year ended April 5, 1932, computed by taking one-sixth of the tax so paid for the year ended May 31, 1931, and five-sixths of the tax so paid for the year ended April 5, 1932, amounted to tax on a sum of 42,159*l*.

The inspector of taxes had objected to the claim on the ground that the amount of tax paid by the company was less than the tax which would have been paid if the profits had been charged in accordance with the rules applicable to Case I. of Sch. D.

It was contended, before the Special Commissioners, on behalf of the respondent company :—

(1.) That under the decision in the case of *Rosyth Building & Estates Co., Ld.* v. *Rogers* (1) proviso (*a*) of s. 33, sub-s. 1, could only be applied to the claim of a company the profits of which the Crown was entitled to charge under Case I. of Sch. D ;

(2.) That this company was admittedly not chargeable under Case I. of Sch. D ;

(3.) That proviso (*a*) did not apply to the claim of the company ;

(4.) That, even if proviso (*a*) applied, the hypothetical assessment ought to be based on the company's profits for the year to May 31, 1931, corresponding to the income tax year 1931–32, and not on its profits for the year to May 31, 1930, corresponding to the income tax year 1930–31 ;

(5.) That, in the alternative, if proviso (*a*) did apply, the only profits of the company which would be chargeable in accordance with the rules of Case I. of Sch. D were the profits which were not chargeable under any other schedule and had not been already charged by deduction ; and

(6.) That the claim should be allowed.

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(1) 8 Tax Cas. 11.

It was contended on behalf of the inspector of taxes :—

(1.) (*a*) That, on a true construction of s. 33, sub-s. 1, proviso (*a*) applied to all companies and banks which claimed repayment under its provisions, whether the profits of such companies or banks were assessable to tax under Case I. or otherwise ;

(*b*) That, accordingly, the said proviso applied to the present claim ;

(2.) That the tax which would have been paid if the profits had been charged in accordance with the said rules (i.e., the rules applicable to Case I. of Sch. D) was tax on the profits of the company for the year ended May 31, 1930, in accordance with the Income Tax Act, 1918, Sch. D, rule applicable to Case I., and the Finance Act, 1926, ss. 29 and 34 ;

(3.) (*a*) That such last mentioned amount of tax was tax on a sum of 48,048*l.*, arrived at as set out above ;

(*b*) That, accordingly, as the tax which had been paid by the company (i.e., tax on 42,159*l.*, see above) was less than the tax on 48,048*l.*, no relief was due to the company.

(4.) Alternatively to (3.) above, that if in calculating the amount of " tax which would have been paid if the profits had been charged in accordance with the said rules "—for whatever year such tax had to be calculated—the profits of the company were to be arrived at by excluding from the computation receipts taxed by deduction, " the tax which would have been paid " by the company would be the tax on the profits as so computed together with the tax deducted from its interest and dividends, and that the aggregate of these amounts would be greater than the tax actually paid by the company for the year 1931–32 ; and

(5.) That the claim should be refused.

Having considered the arguments the Special Commissioners gave the following decision :—

" (1.) The view held by the Court of Session in the case of *Rosyth Building & Estates Co., Ld.* v. *Rogers* (1), that in order that proviso (*a*) of s. 33, sub-s. 1, of the Income Tax

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(1) 8 Tax Cas. 11.

Act, 1918, may operate, the company must be capable of assessment under Case I. of Sch. D, was left untouched by the observations made on that case in the case of *Fry* v. *Salisbury House Estate, Ld.* (1)

The company is admittedly not assessable under Case I. of Sch. D, and, consequently, following the view of the Court in the *Rosyth* case (2), we hold that the proviso cannot be applied in this case.

We accordingly allow the claim in principle.

(2.) If we are wrong in this opinion and what is required by the proviso is a notional assessment under Case I. of Sch. D, whether the company is capable of assessment under that case or not, we hold that the notional assessment must include the whole profits of the company irrespective of the schedule under which they are actually taxed, and must be computed on the previous year's profits in the manner laid down in the rules of Case I.

Even if this is not so, 'the tax which would have been paid' by the company includes, in our opinion, not only the tax which would have been paid under the notional Case I. assessment but also that paid by the company by deduction or under the other cases or schedules.

If we are wrong on both (1.) and (2.) above, it is requested that the case be remitted to us for consideration of the figures in accordance with the judgment of the Court."

Finlay J. (on appeal) said he had formed the view that there was in the *Rosyth* case (2) reasoning leading up to and at the root of the decision which had not been overruled, although the final decision had been overruled in *Fry* v. *Salisbury House Estate, Ld.* (1) There were in the *Rosyth* case (2) two things decided: the first was that the company must be capable of assessment under Case I. in order that proviso (*a*) to s. 33, sub-s. 1, should apply, and the second—and this decision was wrong—that in computing the company's income under Case I. rents could be brought in. He was unable to resist the view that not only Lord Skerrington but also the Lord President and Lord Mackenzie clearly

(1) [1930] A. C. 432; 15 Tax Cas. 266.

(2) 8 Tax Cas. 11.

decided in the *Rosyth* case (1) that the company must be capable of assessment under Case I. not merely notionally but actually. That part of the *Rosyth* case (1) was not overruled by the House of Lords in the *Salisbury House* case. (2) He therefore felt bound to follow the reasoning of the Court of Session in the *Rosyth* case (1), and accordingly dismissed the appeal.

The Crown appealed.

Sir T. Inskip A.-G. and *R. P. Hills* for the appellant. There is no ground for the contention that proviso (*a*) to s. 33, sub-s. 1, of the Income Tax Act, 1918, only applies to companies whose profits are assessable under the rules applicable to Case I. of Sch. D, although in fact they have been assessed otherwise. The relief given by the subsection applies to all companies of the nature there specified whether or not they could legally have been assessed under Case I. of Sch. D, and there is no ground for giving to the proviso fixing a limit to the benefit obtainable under the sub-section any narrower construction. What is contemplated by proviso (*a*) is that there shall be a notional assessment charging the profits under Case I., and no relief is to be given under sub-s. 1 which will reduce the tax paid below that which would then have been payable. The respondents are really asking to have the words in proviso (*a*), which provide that the tax paid shall not be less than the tax which would have been paid "if the profits had been charged in accordance with the said rules," as providing that the tax paid shall not be less than the tax which would have been paid "if the profits *were chargeable* and had been charged in accordance with the said rules."

Finlay J. felt bound to decide against the Crown by reason of what was said in *Rosyth Building & Estates Co., Ld.* v. *Rogers* (1), but that case is of little or no assistance in the light of the decision in *Fry* v. *Salisbury House Estate, Ld.* (2), which decided that when profits are assessable under one Schedule of the Income Tax Act, they cannot also be assessed

(1) 8 Tax Cas. 11. (2) [1930] A. C. 432; 15 Tax Cas. 266.

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under another Schedule. Therefore the only cases where a company otherwise assessed could be assessed under Case I. is when the assessment has been made under another Case of Sch. D: see *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (1) and *Liverpool & London & Globe Insurance Co.* v. *Bennett.* (2) An insurance company if taxed on income derived from investments under Case IV. had no right to make a deduction for expenses of management; and it was to meet this difficulty that s. 14 of the Finance Act, 1915, was passed, while s. 21 extended the same relief to savings banks. The relief so given was embodied in s. 33, sub-s. 1, of the Act of 1918 and extended to include investment companies. The effect arrived at therefore was to put all companies on an equality in regard to this relief. It is the fair inference therefore that all these companies were to have their relief restricted by reference to the tax they would have paid if assessed under Case I., when of course the deduction of management expenses was provided for by the rules. The comments by Rowlatt J. in *Collyer* v. *Hoare & Co.* (3) on the *Rosyth* case (4) show that in that case the Court was assuming that there could be a notional assessment under Case I. of Sch. D to ascertain the limit imposed by s. 33, sub-s. 1, of the Act of 1918: see also per Lord Atkin in *Fry* v. *Salisbury House Estate, Ld.* (5)

[ROMER L.J. None of these cases have dealt with the statement of Lord Skerrington in the *Rosyth* case (6) that it was essential to the success of their case that the Inland Revenue should demonstrate their right to make an assessment under Case I. of Sch. D.]

That is so, and this observation is the only critical matter in the case. If the point made had been an issue in that case the Court would have been asked to disagree with it, but in fact it was only dictum, and Lord Skerrington gave no reason for his view, which related to a point that had not

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(1) (1886) 2 Tax Cas. 165, 172.

(2) [1912] 2 K. B. 41; [1913] A. C. 610; 6 Tax Cas. 327, 368.

(3) (1932) 17 Tax Cas. 169, 181.

(4) 8 Tax Cas. 11.

(5) [1930] A. C. 432, 458.

(6) 8 Tax Cas. 18.

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been argued and which, it was submitted, could not be supported by the language of s. 33, sub-s. 1. There was no ground for restricting the application of proviso (*a*) in the manner suggested.

Latter K.C. and *J. H. Stamp* for the respondents. The object of proviso (*a*) is to preserve to the Crown all the tax which could have been obtained from a company falling within the sub-section, if another part of the Income Tax Act, which it was open to the Crown to use for assessing the company, had been employed for the purpose. The argument for the Crown involves in the present case the creation of a tax which does not exist and of a trade which does not exist for the purpose of arriving at a purely notional sum. Reliance has been placed on what was said by Rowlatt J. in *Collyer* v. *Hoare & Co.* (1) in regard to the *Rosyth* case (2), but Lord Dunedin clearly took a different view of that case: see *Fry* v. *Salisbury House Estate, Ld.* (3); and in the same case Lord Atkin mentions but is careful to avoid discussing the view that there may be a notional assessment. (4) There is no ground why the proviso should be construed as covering the whole subject-matter of the main part of sub-s. 1 of s. 33: compare *Stevens* v. *E. Boustead & Co.* (5) The impossibility of applying Case I. to anything other than a trade is very forcibly pointed out in *Ormond Investment Co.* v. *Betts.* (6) In just the same way it is contended that to take Case I. and to apply it to a case where there is no trade to be taxed is something which the Legislature cannot have contemplated by proviso (*a*) to s. 33, sub-s. 1. When the rules applicable to Case I. are examined they are found to be absolutely inappropriate to such a company as that in the present case. Both on principle therefore and on the ground of Lord Skerrington's statement in the *Rosyth* case (7), which receives support from what was said by Lord Mackenzie in the same case, this appeal should be dismissed.

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(1) 17 Tax Cas. 169, 181.
(2) 8 Tax Cas. 11.
(3) [1930] A. C. 432, 446, 447.
(4) [1930] A. C. 458.
(5) [1918] 1 K. B. 382.
(6) [1928] A. C. 143, 158, 172.
(7) 8 Tax Cas. 18.

[They also referred to *Equitable Life Assurance Society of the United States* v. *Hills.* (1)]

R. P. Hills in reply. It is clear that s. 33, sub-s. 1, only applies to a company carrying on a business, and in such a case there is not the least difficulty in applying Case I. of Sch. D. Then why should the Legislature have made a distinction in the proviso between companies which in part were carrying on a trade and those that were not? The whole of the section is riddled with hypotheses, and in such a case it is not surprising that provision should be made for a notional assessment. The respondents' arguments lead to the dilemma indicated by Romer L.J. that in some cases the company would be allowed to deduct management expenses twice over. Nor is that objection met by proviso (*b*) to s. 33, sub-s. 1.

LORD HANWORTH M.R. This appeal fails. It involves the construction of a very difficult section, s. 33 of the Income Tax Act, 1918, and I confess that my mind has from time to time fluctuated a good deal as to what is the right interpretation of that section. It is designed to give relief to insurance companies and some other companies in respect of management, and the history of the section is this. Sect. 14 of the Finance Act, 1915, first introduced the relief contained in the body of s. 33, sub-s. 1, of the Act of 1918, to insurance companies and by s. 21, sub-s. 2, of the Act of 1915 that relief was extended to saving banks. It was demanded by certain other companies that they also should have the relief which had been accorded by virtue of ss. 15 and 21 of the Finance Act, 1915, and s. 33, sub-s. 1, gave effect to this wish. That this is the history of the matter does not, however, help us, because we have simply to construe the sub-section as it stands.

The facts in the present case are these. The company was incorporated in 1926 and carried on the business of an investment trust company. It was admitted by the inspector of taxes that the company was not carrying on a trade the profits of which were assessable under Case I. of Sch. D. The company being one which did not carry on a trade but carried on the business of an investment trust company, they have claimed that they come within sub-s. 1 of s. 33, as being a company whose business consists mainly in the making of investments and one whose income, as they were able to prove to the satisfaction of the Special Commissioners, was derived from investments. We are told that the receipts of the company were derived from shares and bonds in English and foreign companies and interest on state and municipal loans, and nearly the whole of the receipts were taxed by deduction. The company therefore claimed, on those facts, that they had qualified for the relief made available under sub-s. 1 of s. 33. The inspector of taxes countered that by saying that the relief given by the sub-section was limited by proviso (*a*), which says that "relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules"—that is, the rules applicable to Case I. of Sch. D. A calculation has been made that if the profits of the company had been treated as coming under Case I. the amount which would then have been chargeable to tax would have been a sum of 48,048*l.*, whereas in truth and in fact, according to the measure appropriate to this company when properly taxed in accordance with the Income Tax Act, the sum chargeable to tax is 42,159*l.* and no more. The inspector of taxes contended "that, on a true construction of s. 33, sub-s. 1, proviso (*a*) applied to all companies which claimed repayment under its provisions, whether the profits of such companies or banks were assessable to tax under Case I. or otherwise," and accordingly that the proviso applied to the present case.

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(1) (1924) 8 Tax Cas. 657.

We are therefore face to face with the problem of interpreting this sub-section and saying whether it is of such wide extent that it applies to a company which is not assessable under Case I. of Sch. D, but which has been assessed in accordance with the provisions generally applicable to such a company as this one. The section is distinctly obscure. I will read sub-s. 1 of s. 33, leaving out the immaterial words. It says: "Where . . . . any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom . . . . claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Schedule D, the company . . . . shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management . . . . for that year: Provided that—(*a*) relief shall not be given under this section so as to make the tax paid by the company . . . . less than the tax which would have been paid if the profits had been charged in accordance with the said rules."

I do not hide from myself that if that proviso, especially the last hypothetical part of it, is to apply to every company, so that to the figures provided by the company there is to be applied the formula or system provided by Case I. and the rules thereunder, then it may well be said that this proviso would apply in the present case to cut down the relief given to this particular company under the operative part of sub-s. 1. But we have first of all to appreciate the general system in operation under the Income Tax Acts. First of all, it must be remembered that certain companies, certain businesses, are to be charged under different Schedules according to their characteristics. It is not every trading company or person carrying on a trade that is chargeable in respect of the trade under Sch. D. Case I. indicates that there may be trades which are to be charged otherwise than under Sch. D, for it provides in para. 2: "Tax under this Schedule shall be charged under the following cases respectively; that is to say—Case I.—Tax in respect of any trade not contained in any other Schedule," and similarly Case VI. provides for charging "Tax in respect of any annual profits or gains not falling under any of the foregoing Cases and not charged by virtue of any other Schedule." In its terms, therefore, the Cases of Sch. D are not to include every possible trade, but only the trades which are not contained in any other Schedule.

It has been pointed out that in the *Salisbury House* case (1) Lord Dunedin says that while the Crown cannot select under which Schedule they shall charge a particular subject, they can choose between the Cases and select the Case of Sch. D under which tax shall be charged. His words are these: "From this the Lord President has, without authority, deduced the view that as there is an option between Cases so there must be an option between Schedules, and he bases this in argument on the possibility of an insurance company having securities which would fall under Sch. C and others falling under Sch. D. My Lords, I confess this has been the difficult part of the case to me. It is very obvious to suggest that if the Crown can opt as between Cases why should it not opt as between Schedules, and that the company is carrying on a business I do not doubt. The memorandum of association shows that it is. But I think the answer is that an option between Cases does not in any way disturb the general scheme of the Act, an option between Schedules would. I think on a general survey of the history and policy of the Income Tax Acts one finds the great distinction that there is between Schedules A and B on the one hand and the other three Schedules on the other." It is necessary, therefore, to bear in mind that the Schedules cover cases appropriate to them respectively, but that there is an option to charge to tax under one or another Case of the appropriate Schedule. If an illustration is wanted to show that a choice may be made in the case of insurance companies it is to be found in *Liverpool & London & Globe Insurance Co.* v. *Bennett.* (2) In that case the Master of the Rolls said (3): "The question is whether the appellant company can be charged under Case 1 in Sch. D in respect of the income of certain American and Canadian investments, or whether they can only be charged under Case 4 in respect of such moneys as are actually received in Great Britain. The general principle has been laid down in the Court of Session by Lord Dunedin in *Revell* v. *Edinburgh Life Insurance Co.*" (1), and then he cites a passage from this case and goes on: "I feel no doubt that the Crown has an option to tax under Case 1, or under Case 4, in any state of circumstances falling within that case." It is important then to bear in mind when considering the operative part of sub-s. 1 of s. 33 and the proviso attached to it, which, as Slesser L.J. pointed out in the course of the argument, prima facie is intended to be appropriate to the operative sub-section to which it is a proviso, that there are cases in which an option can be exercised whether the subject shall be charged under Case I. or another of the Cases in Sch. D. And when this is done, it becomes easy, or comparatively easy, to construe the proviso (*a*), because light is thrown on the hypothesis in the last portion of the proviso, "if the profits had been charged in accordance with the said rules," namely, the rules applicable to Case I.

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(1) [1930] A. C. 432, 446; 15 Tax Cas. 266, 312.

(2) [1912] 2 K. B. 41; [1913] A. C. 610.

(3) [1912] 2 K. B. 51.

But it is argued for the Crown that although there are cases where an assessment could properly be made under Case I., there can be under proviso (*a*) what is called a notional assessment under Case I. where that Case is not appropriate because the subject-matter would fall within a different Schedule, and a different mode of assessment would be appropriate. It is said that a notional assessment must be made upon the company in this case by taking the figures of the profits and treating them as if they fell to be charged under Case I. Following out that principle, we are given in the case a figure of 48,048*l.*, which it is said would have been the sum chargeable to tax if the rules applicable to Case I. of Sch. D had been applied. But the course adopted to arrive at this amount is entirely arbitrary. We have here a company which was not carrying on a trade, the income of which was, as to nearly the whole of it, taxed by deduction. There are many difficulties in applying Case I. to such a company. Take, for instance, the provisions in r. 3 of the rules applicable to Case I. as to the allowances which are

(1) (1906) 5 Tax Cas. 221, 226.

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to be made in computing the amounts of the profits or gains to be charged. There are a number of matters in regard to which it would be necessary to make some sort of modification or adjustment in order appropriately to fit or apply the rules under Case I. to a company which was not appropriately charged under that Case. To my mind that is exactly what the House of Lords have said in the *Ormond* case (1) ought not to be done. Rowlatt J. had pointed out the difficulty of applying that Case to an investment company which had started business too late to make it possible to find a standard for charge, and when the case was before the Court of Appeal I ventured to say (2) in regard to r. 1 of Case V., which says that the amount of tax is to be computed on the full amount of the income from stocks, shares or rents in any place out of the United Kingdom " on an average of the three preceding years, as directed in Case I." " For my part, I cannot but accept the view that those words are intended referentially to bring in Case I. with its concomitants." Lord Sumner definitely said that that was not right. He said (3): " I cannot accept this. The analogy between the date of starting a trade, which is an aggregate of many operations, and the date, when an investor buys a stock to hold, is too remote to be applicable, and in any case the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for." Well, I agree respectfully, and I say that in endeavouring to apply my analogy, in order to make the subject chargeable, I was wrong in suggesting that you could bring in referentially some other rules which might be appropriately used to find a basis for the tax. Shortly put, the Crown does not tax by analogy, but by statute. I desire to apply that rule to the present case. It may be that s. 33 is imperfect; it may be that it works too much in favour of the subject or too much in favour of the Crown. I do not know. However that may be, the Court must take the words of the statute as they are, and cannot bring in, however appropriate they may seem to be, some other rules, or adopt some system so as to try and cover the present case.

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(1) [1928] A. C. 143.
(2) [1927] 2 K. B. 326, 341.
(3) [1928] A. C. 158.

I therefore look at the words of the proviso. Do they necessarily apply to all companies coming within sub-s. 1 or do they cover only the cases which could properly be taxed under Case I. ? Proviso (*a*) is in these terms: "Provided that—(*a*) relief shall not be given under this section so as to make the tax paid by the company . . . . less than the tax which would have been paid if the profits had been charged in accordance with the said rules." I add: "As they might have been if instead of choosing a different Case the chargeability to tax had been worked out under Case I.," as in some cases it could be at the option of the Crown. When once it is appreciated that there is such an option and that there may be cases in which a different mode of assessment is applied, although Case I. might have been applied, then I think a full meaning can be given to the hypothesis contained in the proviso by limiting its application to cases in which the profits might have been charged under the said rules. The Crown contend that: "On a true construction of s. 33 sub-s. 1, proviso (*a*) applied to all companies and banks which claimed repayment under its provisions, whether the profits of such companies or banks were assessable to tax under Case I. or otherwise," and "that, accordingly, the said proviso applied to the present claim." I think that so to interpret the section and proviso would be to run counter to the *Ormond* case (1); it would be to mould the section and proviso in a manner which is not necessary when regard is had to the whole policy and system of the Income Tax Acts.

In these circumstances it appears to me that the contention of the Crown is wrong. I will only add that I quite agree that proviso (*b*) and proviso (*c*) must also be taken into account when construing the section and proviso (*a*), but proviso (*b*) seems to me quite appropriate when proviso (*a*) is construed in the manner I have suggested, because it provides that the amount of the income or profits derived from sources not charged to tax shall be deducted from the

(1) [1928] A. C. 143.

expenses of management. As in the case of proviso (*b*) there are particular cases in which what may be called the detailed provisions in proviso (*c*) will be appropriate and must be brought into play. Provisos (*b*) and (*c*) do not, however, militate against the interpretation which I have given to proviso (*a*), and I have come to the conclusion that it is not right to say that this proviso applies to all companies which claim repayment under the section and I hold that the proviso does not apply to the present company.

For these reasons the appeal fails and must be dismissed with costs.

SLESSER L.J. I agree. The relief given to the appropriate companies under s. 33, sub-s. 1, of the Act of 1918 may arise in two different ways. It is made essential by the language of that sub-section that it be proved to the satisfaction of the Special Commissioners that for any year of assessment a company " has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Schedule D "; but the finding that the company has not been charged in respect of its profits in accordance with these rules may arise either because the Crown has elected in a case where the company is assessable under Case I., Sch. D, to charge it under some other Case, or because the company is not chargeable under Case I. in any event.

There is no doubt in my mind that proviso (*a*), which limits the amount of relief which may be derived from the expenses of management, including commissions, applies in cases where the Crown had the option either to charge under Case I. or otherwise and elected not to charge under Case I. In that case there is no difficulty in applying the language of the proviso : " Relief shall not be given under this section so as to make the tax paid by the company . . . . less than the tax which would have been paid if the profits had been charged in accordance with the said rules." In the case of a trading company or other company appropriately coming under Case I., it is a mere matter of arithmetic to calculate what would have been the charge under Case I.; and being a company which in its nature and in its incidence is appropriately covered by Case I., then although the Crown has elected not to proceed under Case I., there is no difficulty at all in ascertaining what would have been the tax paid if the profits had been charged in accordance with Case I. of Sch. D.

The difficulties to which my Lord referred, the difficulties of ascertaining the exemptions, the difficulty of assuming a trade where there is no trade; none of these difficulties arise where the Crown could have charged a company under Case I. if they had wished to do so, and in such a case the proviso fully satisfies all the conditions. But the difficulty which arises in this case, and in cases similar to this, where the company is not carrying on a trade at all, is that the Crown are seeking to apply para. 2 of Sch. D, which speaks of tax under Case I. being "in respect of any trade not contained in any other Schedule," to a case where there is no trade; and that raises the problem of ascertaining what are the incidence of the trade which in fact does not exist. The matter does not end there. There are all the difficulties which would arise in attempting to apply r. 3 of the rules applicable to Cases I. and II. with regard to the deductions permitted in computing the profits or gains to be charged, including the deduction of money wholly and exclusively laid out or expended for the purposes of the trade. That is a very great difficulty, but it is said by the Crown in answer that the moneys which are to be assumed to have been laid out in respect of the trade must mean the same thing as expenses of management, including commissions, which appear in the principal part of s. 33. It may be so or it may not be so. I had occasion to point out to Mr. Hills in the course of the argument that whether a commission is or is not a deductible expense has been held in *Stott & Ingham* v. *Trehearne* (1) to be a question of fact; some commissions are so deductible and some are not. One would have thought that if the Legislature had intended that the deductions which fall in Case I. to be deducted were to be regarded as of the same order as the deductions of expenses of management which are referred to under s. 33, sub-s. 1, then the Legislature would have used the same language, instead of which it uses different language. The matters therefore are not necessarily the same.

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(1) (1924) 9 Tax Cas. 69.

Nor am I satisfied that the provision for computing income tax on the profits or gains of the year preceding the year of assessment in s. 29 of the Finance Act, 1926, is necessarily to be imported by analogy by the words in proviso (*a*) on which the Crown rely in applying it to a case like this where there is no trade. All these matters seem to me to show that the Crown are inviting us to put a construction by analogy upon these words and to apply it to a case where admittedly there is no trade in the very manner in which, as my Lord has pointed out, we have been warned not to proceed.

As Lord Cairns said in *Pryce* v. *Monmouthshire Canal and Railway Companies* (1): "The taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequence." I think the construction of those words of the proviso limits the right of the Crown to put a maximum upon the relief given under s. 33, to cases where the Crown had the option to proceed to tax on the basis of trade either under Case I. or under some other case, and that it is not applicable to the case of a company which was not carrying on a trade. In other words I have come to the conclusion that the language used in the *Rosyth* case (2) in this matter by Lord Skerrington is right, and that we should follow the view taken by the Court below in adopting those words. I do not think anything said in the *Salisbury House* case (3) deals with this particular matter. Because therefore I agree with the views expressed by Lord Skerrington, and because of the reasons which I have given myself when considering the matter anew—because of course what Lord Skerrington said is not binding upon us—I am of opinion that this appeal fails.

(1) (1879) 4 App. Cas. 197, 203.
(2) 8 Tax Cas. 11, 18.
(3) [1930] A. C. 432.

ROMER L.J. I have come to the same conclusion, though not without difficulty, and in spite of the fact that some of the difficulties I have felt are not entirely removed. On the whole I think the proper construction of s. 33, sub-s. 1, is that for which Mr. Latter has contended. The object, or the general object, of the section cannot be in doubt. There are many companies the principal part of whose income is derived from investments, and in respect of those investments the companies have been taxed by deduction at the source or by direct assessment, but they have never had an opportunity of bringing in as against their profits, that is to say, deducting from their profits for the purposes of taxation, their management expenses, either because they were not trading companies at all, or because, being trading companies, the Crown had elected to tax them on the income of their investments rather than under Case I. of Sch. D. It was that injustice—if anything can be called an " injustice " under the Income Tax Acts—that the section was intended to remove.

The first question which arises on the construction of the section is as to the meaning of the words " its profits in accordance with the rules applicable to Case I. of Schedule D " in the sub-section itself. Do those words refer only to profits that could be taxed under Case I. of Sch. D, or do they include all profits chargeable under any Schedule to the Income Tax Acts ? In my opinion, they mean merely the profits which could be taxed under Case I. In the first place, it is to be observed that the sub-section is only concerned with companies whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank, or other bank for savings. Now in the case of such a company, the greater part of its income will be taxed by deduction at the source or by direct assessment, and there is hardly a company of that description whose total profits would be actually charged under Case I. of Sch. D. The company would be receiving, perhaps, income from real estate, income from investments being from sources chargeable under Sch. C, or income from investments being from sources chargeable under Cases other than Case I. of

Sch. D, and it is difficult, as I say, to conceive a company of that description all of whose income or profits would be charged under Case I. of Sch. D. In the next place, the sub-section seems to contemplate two cases: first, where the profits have been charged under Case I., and secondly, where the profits have not been charged under Case I. It is difficult in contrasting those two cases to assign different meanings to the word "profits." Supposing a trading company such as is described in the sub-section earned a small profit which could be properly charged under Case I., and it had been so charged, could that company possibly come before the Court and say: "I come within the words of the section because my profits have not been charged in accordance with the rules applicable to it"? If it could, this strange result would follow: in the present case the income from investments has been going down lately. Take a case where the income from investments has been going up. Could a trading company go to the Commissioners and say: "My income this year from investments was 10,000*l.*, and I have been taxed by deduction on that 10,000*l.*, and also I was charged on my 500*l.* profit which I made from other sources under Case I., but my profits as a whole have not been charged under Case I. I want you to deduct from my 10,000*l.* for the purposes of taxation the whole of my management expenses." The Commissioners would say: "What about proviso (*a*)"? The answer would be: "If proviso (*a*) has attached to it the meaning for which the Crown are contending in this case, you will find, if you take last year, that my income was very small from investments, and therefore, although my trading profits have in fact been taxed under Case I., yet I come within this sub-section and I am entitled to have my management expenses deducted from the income of 10,000*l.*, because in the circumstances proviso (*a*) does not apply." I cannot help thinking that the case contemplated in sub-s. 1 is a case in which certain profits might have been taxed under Case I., but in point of fact have not been so taxed. If that is so, and the word "profits" in the sub-section means only profits which could be dealt with under Case I., I cannot attach a different meaning to the word "profits" in proviso (*a*). It appears to me that the body of the sub-section is dealing with a case where certain profits have not been taxed under Case I., and proviso (*a*) is dealing hypothetically with the converse case, that is to say, what would happen if those profits had been taxed in this way. I think the one must be contrasted with the other, and that both are dealing with the same subject-matter.

I come to the difficulties with which Mr. Latter is confronted by the adoption of that construction, and I think the difficulties are serious. He says, of course, and rightly: "Putting that construction on the proviso, the proviso does not apply at all to a non-trading company, because a non-trading company never has any profits which can be dealt with under Case I." That being so, it is said against him: "But then the sub-section does not apply to the company at all, because the sub-section is only contemplating a company, on your own showing, which has got profits which are capable of being dealt with under Case I." The only way out of that difficulty, which I think is a legitimate way, is to treat the words "has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Schedule D" as being prefaced by these words "in the case of a trading company." I think there is authority for adopting such a construction; in other words, for saying that those words do not in the least cut down the generality of the preceding ones, but only deal with such companies comprised in the preceding words as those words are applicable to, and therefore to treat these words as only applying to a trading company. The other difficulty I have felt is also a serious one, and apparently is more difficult to get over. Let me take the case of a non-trading company which has income from investments 10,000*l.* to be taxed by deduction or by direct assessment, but has also derived a profit of 500*l.* It cannot be taxed under Case I., because it is a non-trading company. Mr. Latter says, if in that case the company's management expenses were 2000*l.*, it is entitled to deduct the 2000*l.* for the purposes of taxation from the 10,000*l.*, and

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only be taxed on the 8000*l.* The result of that, of course, is that proviso (*a*) will not apply to it, and that the company is paying tax on 8000*l.* net when its net income is 8500*l.*, which does not seem particularly just, or an end which the Legislature probably had in view. Similarly in the case of a trading company. Take a trading company which has got an income of 10,000*l.* from investments and a gross profit of 500*l.* from its trading, with management expenses 2000*l.* Now it has made no profit which can be assessed under Case I.; it has made a loss. Then Mr. Latter says: "Proviso (*a*) does not affect me because there is no profit; I am still entitled to have 2000*l.* deducted from my 10,000*l.* for the purposes of taxation and disregard altogether that 500*l.* which I earned, because I made a loss as a whole on my trading." There again he would be paying income tax on a net income of 8000*l.* when his net income is 8500*l.* As I say, it is more difficult to escape from that dilemma than from the earlier one. The only possibility I can see of escape from it is by saying that proviso (*b*), which I agree from its language does not appear to be directly intended to apply to such a case, is nevertheless, in view of the language, capable of applying to such a case, so that in both those cases the management expenses can be reduced for the purposes of the sub-section by deduction of the 500*l.* as a profit from a source which has not been charged in fact. As I say, I feel those difficulties, but yet it appears to me that the difficulties involved in accepting the contention of the Crown on the true construction of the word "profits" in the sub-section and in the proviso are much more difficult—in fact impossible really to get over.

It is for these reasons that I agree that this appeal fails. I will only add that I agree with the observations made by Slesser L.J. as to the *Rosyth* case. (1)

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Clifford-Turner, Hopton & Lawrence.*

H. C. G.

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(1) 8 Tax Cas. 11.

LANCASHIRE COUNTY COUNCIL *v.* SOUTHPORT BOROUGH COUNCIL.

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May 8, 9.

Poor Law—Settlement and Removal—Irremovability—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *s.* 132, *and Ninth Schedule, Part I.—Poor Law Act,* 1930 (20 *Geo.* 5, *c.* 17), *ss.* 93, 104.

By the Poor Law Act, 1930, s. 93, sub-s. 1: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order."

By s. 104 "no person shall derive or acquire . . . . a settlement or status of irremovability except in accordance with the provisions of this part of this Act; and any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates."

A poor person who was born at Chorley in the county of Lancaster on August 25, 1878, was a domestic servant from 1894 to 1896, residing in the parish of Leyland in the said county. From 1896 to May 25, 1900, she resided in the parish of Ormskirk in the said county. From May 25, 1900, to August 27, 1900, she was an inmate of Ormskirk Union poor law institution. From August 27, 1900, to October 3, 1907, and from November 7, 1907, to January 25, 1911, she resided at various addresses in the parish of Ormskirk without receiving relief. From January 25, 1911, to March 12, 1913, she was again an inmate of Ormskirk poor law institution. From March 12, 1913, to March 16, 1913, she resided in the county borough of Southport without receiving relief. On March 16, 1913, she was admitted into the casual wards at the county borough of Southport, and on March 17, 1913, she was transferred to Ormskirk Union poor law institution, where she remained until March 14, 1931.

Before April 1, 1930, the "appointed day" under the Local Government Act, 1929, the parish of Ormskirk and the area comprised in the county borough of Southport were within the Ormskirk poor law union. After the "appointed day" the area comprising the county borough of Southport became a separate poor law area, and that comprising the parish of Ormskirk became part of the poor law area of the county of Lancaster.

From March 14, 1931, to November 17, 1931, and again from November 17, 1931, to March 3, 1933, the poor person resided in the county borough of Southport and was in receipt of outdoor relief. On October 12, 1932, the Minister of Health made an order under the Poor Law Act, 1930, s. 161, that the poor person was chargeable to the county borough of Southport. On March 3, 1933, the justices at Southport made an order that she should be removed to the county of Lancaster, but the court of quarter sessions for the county of Lancaster reversed this order, holding that the poor person was resident in the county borough of Southport immediately before the appointed day, and that she had acquired a status of irremovability in Southport in virtue of the Local Government Act, 1929, Ninth Schedule, Part I., para. 3, sub-paras. 2 and 3. The respondents appealed by case stated to the Divisional Court:—

Held, that the poor person had on March 3, 1933, acquired a residence at Ormskirk in the county of Lancaster, which had never been superseded, and that residence in Southport for one year next before that date, as required by s. 93 of the Poor Law Act, 1930, for purposes of irremovability, had not been established. The order of the court of quarter sessions must be quashed and that of the justices restored.

Semble: The Poor Law Act, 1930, being a complete code dealing with settlement and removability, alone applies in such a case and is not affected by the provisions of Part I. of the Ninth Schedule of the Local Government Act, 1929. But even if that Schedule does apply, para. 3, sub-para. 1, of Part I. thereof must be construed quite apart from para. 3, sub-paras. 2 and 3.

In the above case the poor person had at the appointed day a settlement in the county of Lancaster.

Held, therefore, that para. 3, sub-para. 1, which deals with "settlement," applied, to the exclusion of para. 3, sub-paras. 2 and 3, which deal with "irremovability."

Per Avory J.: The only purpose of para. 3, sub-para. 3, is to enact that consecutive periods of residence in different places within a poor law union are to be deemed "continuous residence" in that part of the union in which the poor person so resided immediately before the appointed day.

CASE stated by justices of quarter sessions for the county of Lancaster.

At the above quarter sessions held in April and July, 1933, the Southport Borough Council appealed against an order made by Southport justices that Margaret Traynor, a person then receiving poor relief from the general rate fund of the county borough of Southport, should be removed to the county of Lancaster, and that the council of that county should receive and provide for her according to law. The court of quarter sessions allowed the appeal and quashed the justices' order, but stated a case for the opinion of the High Court.

The facts as appearing in the case stated were as follows: Margaret Traynor (therein described as "the poor person") was born at Chorley in the county of Lancaster on August 25, 1878. She resided at various addresses in Leyland and Chorley, both in the county of Lancaster, until she attained the age of sixteen years in 1894.

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From 1894 to 1896 the poor person was a domestic servant residing in the parish of Leyland in the county of Lancaster aforesaid. From 1896 to May 25, 1900, the poor person resided in the parish of Ormskirk in the county of Lancaster. From May 25, 1900, to August 27, 1900, she was an inmate at the Ormskirk Union poor law institution. From August 27, 1900, to October 3, 1907, she resided at various addresses in the parish of Ormskirk aforesaid. From October 3, 1907, to November 6, 1907, she was again an inmate at the Ormskirk Union poor law institution. From November 7, 1907, to January 25, 1911, she resided at various addresses in the parish of Ormskirk aforesaid, without receiving relief. From January 25, 1911, to March 12, 1913, she was again an inmate at the Ormskirk Union poor law institution. From March 12, 1913, to March 16, 1913, she resided in the county borough of Southport without receiving relief. On March 16, 1913, she was admitted into the casual wards at the county borough of Southport. On March 17, 1913, she was transferred to the Ormskirk Union poor law institution, where she remained until March 14, 1931. Prior to April 1, 1930, the " appointed day " under the Local Government Act, 1929, the parish of Ormskirk and the area comprised in the county borough of Southport were within the Ormskirk poor law union. After the " appointed day " the area comprising the county borough of Southport became a separate poor law area and the area comprising the parish of Ormskirk became part of the poor law area of the county of Lancaster. From March 14, 1931, to November 17, 1931, the poor person resided in the county borough of Southport without receiving relief. From November 17, 1931, to March 3, 1933, the date of the removal order, she resided in the county borough of Southport and was in receipt of outdoor relief. On August 31, 1932, under the Poor Law Act, 1930, s. 161, the parties submitted a question to the Minister of Health as to the chargeability of the poor person. On October 12, 1932, the Minister of Health made his decision upon the said submission saying that the poor person was chargeable to the said county borough of Southport but not deciding whether or no she was irremovable from the said county borough of Southport. On March 3, 1933, the removal order was made as aforesaid.

On behalf of the council of the county borough of Southport it was contended as follows: that the order of the justices sitting as a court of summary jurisdiction was in law correct; that the poor person had acquired a settlement in the parish of Ormskirk and that therefore the poor person had by virtue of sub-para. 1 of para. 3 of the Ninth Schedule of the Local Government Act, 1929, acquired a settlement in the said county of Lancaster and was not on April 1, 1930, in the course of acquiring a settlement in the county borough of Southport; that the poor person having already acquired a settlement in the parish of Ormskirk was by reason of such settlement irremovable from the Ormskirk poor law union at any time after the year 1899 and could not subsequently have acquired or be in the course of acquiring a status of irremovability in the same poor law union even if residing in another part of the said union; that the part of the poor law union by reason of residence wherein the poor person acquired a status of irremovability was the parish of Ormskirk, where she had acquired a status of irremovability before the end of the year 1897 and had never lost such status of irremovability, and that the poor person could not on April 1, 1930, be in the course of acquiring a status of irremovability in the poor law union of Ormskirk for the reason that she already had acquired a status of irremovability therefrom; that sub-para. 3 of the said para. 3 is only directed to the method of reckoning continuous residence in the case of persons who are qualifying for a status of irremovability and had not acquired a settlement in a parish or a state of irremovability from a union; that as the poor person was not on April 1, 1930, resident anywhere for poor law purposes as she was at that date in receipt of poor relief she was not on that date in the course of acquiring a status of irremovability.

On behalf of the council of the county of Lancaster it was contended as follows: that the order of the justices sitting as a court of summary jurisdiction was in law erroneous; that the poor person had gained a status of irremovability in

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the said county borough of Southport and was therefore irremovable therefrom; that under the provisions of the Ninth Schedule to the Local Government Act, 1929, the period of residence of the poor person without receiving relief in the parish of Ormskirk within the Ormskirk poor law union from November 7, 1907, to January 25, 1911, should be aggregated with the five days' residence without receiving relief in the said county borough of Southport also within the Ormskirk poor law union from March 12, 1913, to March 16, 1913, and reckoned as continuous residence in the said county borough of Southport; that the period of residence of the poor person without receiving relief in the county borough of Southport from March 12, 1913, to March 16, 1933, was residence immediately before the appointed day under the Ninth Schedule to the Local Government Act, 1929, inasmuch as by the Poor Law Act, 1930, s. 93, sub-s. 1, the periods of residence of the poor person in Ormskirk Union from January 25, 1911, to March 12, 1913, and from March 16, 1913, to April 1, 1930, were not to be regarded as interrupting the residence of the poor person, and were to be excluded in computing the period of residence.

The court of quarter sessions gave a considered judgment in which they held that the case was governed by the Local Government Act, 1929, Ninth Schedule, Part I., para. 3, sub-paras. 2 and 3; that the poor person's residence in the borough of Southport between March 12, 1913, and March 16, 1913, must be aggregated with her previous residence in the parish of Ormskirk from November 7, 1907, to January 25, 1911, and that the period thus aggregated fell to be reckoned as continuous residence in the county borough of Southport, which was the place where she resided immediately before the appointed day within the meaning of para. 3, sub-para. 3, aforesaid.

The court of quarter sessions was therefore of opinion that the order of the justices was wrong in point of law: that the poor person was resident in the county borough of Southport immediately before the appointed day; and that she had acquired a status of irremovability in the county borough of

Southport. The question for the opinion of the Divisional Court was whether the court of quarter sessions came to a correct decision in point of law.

R. M. Montgomery K.C. and *G. G. Blackledge* for the Southport Corporation. The Poor Law Act, 1930, s. 104, renders the provisions of Part III. of that Act retrospective as to settlement and removability upon questions arising on or after October 1, 1927. The poor person in this case acquired a residence in Ormskirk in the county of Lancaster (s. 93, sub-s. 1). The period from March, 1931, to November of 1931, being less than a year, during which she resided in Southport did not give her a status of irremovability. Before that she was resident in Ormskirk from March, 1913, to March, 1931.

"Settlement" arises from residence for three years in a county or county borough in such circumstances as would confer irremovability (s. 86). An order for removal cannot be made if the person is settled within a county or county borough (s. 93), or is irremovable. Here the poor person was settled in the county of Lancaster, and this continued from 1878 to 1913. A person cannot acquire a status of irremovability within the district in which he is settled. That is only possible when he moves from one district to another, in which case he cannot be removed back, if irremovability is acquired. Settlement gives a position of irremovability until a settlement in another district is acquired. There is then a status of irremovability in the new area which is less than that of settlement, provided that there is residence in the new area for one year. The Local Government Act, 1929, has no bearing on the present case, because the provisions of the Act of 1930 are retrospective, and by s. 132 of the former Act the provisions of the Ninth Schedule thereof, which relate to transitory and temporary matters, are to have effect for the purposes of that Act.

But even if the Act of 1929 does apply, the order of the court of quarter sessions is wrong, because a status of irremovability cannot be acquired in a union in which a person already has a settlement. The Local Government

Act, 1929, Ninth Schedule, Part I., para. 3, sub-para. 2, can only refer to cases where there is no settlement. Once a settlement is acquired under para. 3, sub-para. 1, the rest of the paragraph (2.) and (3.) can have no application.

J. E. Singleton K.C. and *Basil Nield* for the Lancashire County Council. This question depends upon the Local Government Act, 1929, Ninth Schedule, Part I., para. 3, sub-paras. 2 and 3, and is not affected by the Poor Law Act, 1930, s. 104, which does not repeal the Ninth Schedule of the Act of 1929. That Schedule dealt particularly with the splitting up of unions, which took place on April 1, 1930, and it laid down transitional provisions as to the status of poor persons in a union which was being divided into two. Under the Act of 1929 a settlement in a parish goes together with the status of irremovability. The Local Government Act, 1929, Ninth Schedule, Part I., para. 3, sub-para. 1, deals with the acquisition of a settlement, but in para. 3, sub-para. 3, " consecutive periods of residence in two or more places " are dealt with, and these are to be reckoned as " continuous residence " in the place of residence as it was immediately before the appointed day. Here the periods of residence for five days at Southport in March, 1913, and in the parish of Ormskirk prior to April 1, 1930 (the appointed day), gave her a status of irremovability in Southport. Southport was then in Ormskirk poor law union. If the periods of residence were consecutive then they must be aggregated and count as " continuous residence " for periods before the appointed day. The period during which the poor person was in receipt of outdoor relief is excluded expressly by the Poor Law Act, 1930, s. 93, sub-s. 1 (*f*), and does not interrupt residence : *Hartfield* v. *Rotherfield* (1) ; *Poplar Union* v. *West Ham Union*. (2)

" Irremovability " is a term applied to the union and not to the parish in which the poor person resided. After three years' residence the status of irremovability gives place to " settlement." If on the appointed day the poor person is not living in the parish in which a settlement was acquired, reference must be made to the Act of 1929. The Local Government Act, 1929, and the Poor Law Act, 1930, came into force on the same day. Southport was in the Ormskirk Union, and this poor person had the status of irremovability from Southport. This is not lost because she is settled in a parish in the union, and she is deemed to be settled in Southport.

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(1) (1852) 17 Q. B. 746.

(2) (1906) 94 L. T. 769.

Montgomery K.C. in reply. As regards the Poor Law Act, 1927, s. 121, an order for removal will only be made if the poor person is not settled within or irremovable from the union. The Act of 1930, s. 93, does not apply where there is a settlement, and irremovability arises from a settlement.

As to the Local Government Act, 1929, Ninth Schedule, para. 3, the first sub-paragraph applies here, and that being so there is no need to refer to sub-paras. 2 and 3.

A similar case of "transitory" provisions appears in the Law of Property Act, 1925, Sch. I, Part IV., and the Court so construed them as being independent of each other in effect: *In re Dawson's Settled Estates.* (1)

May 9. LORD HEWART C.J. This is a case stated by the justices of the court of General Quarter Sessions of the Peace held at Liverpool for the county of Lancaster. It is an appeal on the part of the respondents, the Mayor, Aldermen and Burgesses of the county borough of Southport.

The question, and it is a difficult question, to which the case gives rise came about in the following way. An order was made by justices for the borough of Southport on March 3, 1933, that one Margaret Traynor, a person then receiving poor relief from the general rate fund of the county borough of Southport, should be removed to the county of Lancaster and that the council of the county of Lancaster should receive and provide for her according to law. Against that order the council of the county of Lancaster appealed and the appeal was heard on April 21, 1933; the court of quarter sessions, subject to this case stated, allowed the appeal and quashed the order of the court of summary jurisdiction. The question raised by this case is whether in so deciding the court of quarter sessions came to a correct determination in point of law.

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(1) [1928] Ch. 421.

The learned deputy chairman of the Lancashire quarter sessions has delivered in this case a careful and, indeed, elaborate judgment which we have had the advantage of hearing, and it is a judgment which is entitled to every respect, but I have come to the conclusion upon the facts of the case and the law which seems to be applicable to those facts that the decision of that court was erroneous in point of law and that the respondents are entitled to succeed upon this appeal.

The matter, as Mr. Singleton in his very able argument admitted, is complicated by the provisions of three successive statutes: the Poor Law Act, 1927, the Local Government Act, 1929, and the Poor Law Act, 1930; but I cannot help thinking that the court of quarter sessions in this case paid too little attention to the express provisions of the Poor Law Act, 1930, which came into operation upon the day that was the appointed day under the Act of 1929. The court of quarter sessions decided that this poor person was resident in the county borough of Southport immediately before the appointed day, that is to say, immediately before April 1, 1930, and, further, that the poor person had acquired a status of irremovability in the county borough of Southport.

It is not necessary, I think, to reiterate the facts. The question which has to be decided is, What was the true position of this poor person on March 3, 1933, when the order of the justices was made? Sect. 104 of the Poor Law Act, 1930, provides as follows: "No person shall derive or acquire, or be deemed to have derived or acquired, a settlement or status of irremovability except in accordance with the provisions of this Part of this Act; and any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates." That section contains a proviso in two parts neither of which applies to the present case. By s. 86 of the Poor Law Act, 1930, it is provided that: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough." By s. 93 it is provided that "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the Order." Then there is a proviso, the effect of which is that certain times are not to be regarded as interrupting the residence in the county or county borough and are to be excluded in the computation of time for all purposes.

Regard being had to those sections it seems to me to be clear that this poor person long before 1933 had acquired a settlement in the county of Lancaster and had never lost that settlement and had never had that settlement superseded by any other settlement. The court of quarter sessions has really decided this case upon the provisions of the Local Government Act, 1929, which, by s. 132, enacted that certain provisions set out in the Ninth Schedule to the Act should have effect for the purposes of the Act. It appears to me that when one comes to the Act of 1930, for the purposes at any rate of this present case, those provisions have no effect. The provisions which were applicable were the provisions of the complete code set out in the Poor Law Act of 1930; but even if s. 132 of the Local Government Act, 1929, had been saved by the Act of 1930 (which does not mention it, although by s. 165 of the Poor Law Act, 1930, s. 20 of the Local Government Act, 1929, is saved), the question would still remain whether the provisions of the Ninth Schedule have been correctly interpreted.

The relevant part of the Ninth Schedule is the third paragraph, which relates to settlement and irremovability, and the court of quarter sessions, applying sub-paras. 2 and 3 of that paragraph of the Schedule, has added together a period of five days' residence from March 12, 1913, to March 16, 1913, in Southport, to certain periods of residence in the parish of Ormskirk which, before April 1, 1930, the appointed day under the Act of 1929, was comprised within the Ormskirk poor law union; that is to say, at that time Southport, no less than Ormskirk, was in the Ormskirk poor law union, and the justices have come to the conclusion that if these periods are added together it follows that this poor person had acquired a status of irremovability in Southport. In the case stated, where the opinion of the court of quarter sessions is expressed, it is stated in terms: "That the poor person had acquired a status of irremovability in the said county borough of Southport."

That conclusion seems to me to involve a misreading of this portion of the Ninth Schedule. Part I., para. 3, consists of three sub-paragraphs, the first of which deals with settlement, the second with status of irremovability, and the third with a particular aspect of the matter dealt with in sub-para. 2. It seems to me that sub-para. 1 is complete in itself. It provides as follows: "Every person who at the appointed day has, or is in the course of acquiring, a settlement in any parish by reason of residence, birth or other qualification therein, shall be deemed to have or to be in the course of acquiring a settlement in the county or county borough in which the parish is comprised." Where those facts are found it does not appear to me that the remaining parts of this particular portion of the Ninth Schedule have any bearing on the matter. Sub-para. 2 goes on to deal with status of irremovability; sub-para. 3 goes on to make provisions for the purposes of sub-para. 2, and, as Mr. Singleton admitted, unless sub-para. 2, and, therefore, sub-para. 3 apply, he cannot be right in his contention. In my opinion those paragraphs do not apply. Here the facts show that at the material time this poor person had a settlement and a status of irremovability in Ormskirk and in the county of Lancaster. Even if it were the case that the Ninth Schedule applied here, para. 3, sub-paras. 2 and 3, upon which this very careful judgment is really founded, do not appear to me to be in any way applicable to the facts of this case.

For these reasons, without going further into this matter of extreme complication, I think that the contention of the respondents in the court below, that the order of the justices sitting as a court of summary jurisdiction was in law correct, was right and that the poor person had acquired a settlement in the parish of Ormskirk, and, that being so, there was no occasion to enter upon the difficult inquiry with which the court of quarter sessions appears to have occupied itself.

I come to the conclusion, therefore, that the decision of the court of quarter sessions was erroneous and that this appeal ought to be allowed and that the order of the justices made on March 3, 1933, ought to be restored.

AVORY J. I agree that this appeal should be allowed and the order made by the justices restored.

In my opinion the guiding star to the solution of this problem is to be found in s. 104 of the Poor Law Act, 1930, which provides that "any question arising on or after the 1st day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions had been in force at all material dates."

It is admitted in this case that the poor person had acquired a settlement in the county of Lancaster, and at the material date in March of 1933 that was her settlement. Prima facie therefore any question arising when she became chargeable should be determined by removing her to her place of settlement, and the only question that remains is whether at that time, although she had a settlement in the county of Lancaster, she was in fact irremovable from the borough of Southport.

In order to determine whether she was at that time irremovable from the borough it is necessary to look at the provisions of this same Act, the Poor Law Act, 1930, in order to see what is a status of irremovability. As my Lord has pointed out, that is determined by s. 93: "No person shall be removed, nor shall any order be made for the removal of any person, from any county or county borough in which he has resided for one year next before the application for the order." That means of course that unless residence for one year next before the application for the order is established, then the person is removable.

Mr. Singleton, with his usual candour and discernment, has admitted that unless the case can be brought within sub-para. 3 of the third paragraph of the Ninth Schedule to the Local Government Act, 1929, it cannot be established that this poor person had resided in the borough for one year next before the application for the order. I have grave doubt whether this Ninth Schedule has any application at all in this case. Sect. 132 of the Local Government Act, 1929, provides that: "The provisions set out in the Ninth Schedule to this Act (which relate to transitional and temporary matters) shall have effect for the purposes of this Act." That Ninth Schedule therefore has application only to the transitional and temporary measures which are dealt with in that Act of 1929. Looking, as I say, at the Poor Law Act, 1930, as a new code which is laid down for the determination of questions of this kind, I doubt whether that Schedule has any application in this case. If it has, I agree with my Lord that it is para. 3, sub-para. 1, of Part I. of that Ninth Schedule which applies in this case; and I also doubt very much whether sub-para. 3, even if it did apply, would be sufficient to establish that there had been a residence for one year next before the application for the order, because it appears to me, speaking for myself, that the only purpose of sub-para. 3 is to enact that consecutive periods of residence in different places within a poor law union are to be deemed continuous residence in that part of the poor law union in which the person so resided immediately before the appointed day. We are not, in this case under the Poor Law Act, 1930, dealing with any question which arises about the appointed day. The whole of those provisions in that Schedule, as I have pointed out, are by s. 132 apparently intended to deal only with matters provisional or temporary and transitional which are to have effect on the appointed day.

I come to the conclusion therefore that the residence in the borough for one year next before the application for the order was not established on the facts of this case, that the poor person was therefore removable and, being removable, could only properly be removed to her place of settlement, which was in the county of Lancaster.

TALBOT J. I am of the same opinion. I think the matter becomes reasonably clear when s. 104 of the Poor Law Act, 1930, is read according to its plain and distinct language. It is of the essence of this case that this Act was passed a year after the Act of 1929 (in which the Schedule which is relied upon by the respondents here is to be found) and in full view of it. Sect. 104 is perfectly distinct and it has two branches. The first is a negative future enactment and the second is a retrospective enactment. It begins by saying: "No person shall derive or acquire, or be deemed to have derived or acquired, a settlement or status of irremovability except in accordance with the provisions of this Part of this Act." That appears to be perfectly plain, and it is an enactment which would take effect from the time at which this statute comes into force. It seems equally plain that when you look to see what are the provisions of this Part of the Act of 1930 which relate to settlement and to status of irremovability, you have to look back to the earlier sections of this Part, and, with regard to irremovability, that is to be found dealt with, and dealt with only in s. 93, which has already been mentioned.

Then the latter part, which is retrospective and which is a comprehensive pursuit apparently of the same object (that is to say, to establish the completeness of the provisions of the Act of 1930 with regard to these matters), enacts in plain terms that "any question arising on or after the first day of October, 1927, as to the settlement or removability of any person shall be determined as if those provisions"—that is to say, the provisions as to settlement and irremovability contained in the Act of 1930—"had been in force at all material dates." I confess it seems to me difficult to find language plainer if the intention of Parliament was, as it appears to be, to make the Act of 1930, passed in full view of the legislation of 1929, a complete code with regard to this matter ; and it is admitted that if that is the correct interpretation of it, and if s. 93 is the effective section dealing with this matter, the judgment of the court of quarter sessions cannot be supported.

I therefore agree with the judgment of my Lord that the appeal must be allowed.

Respondents' appeal allowed.

Solicitors for the Lancashire County Council: *Greenwell & Co., for Sir George Etherton, Clerk to the Council.*

Solicitors for the Southport Corporation: *Sharpe, Pritchard & Co., for Richard Edgar Perrins, Town Clerk, Southport.*

F. P. F.

LEISERACH *v.* SCHALIT.

SCHALIT *v.* LEISERACH.

1934
May 29, 30, 31.

Arbitration—Award—Motion to set aside—Conflict of Evidence—Application to call arbitrator as witness—Jurisdiction of Court—Rules of Supreme Court, Order XXXVIII., *r.* 1 ; *Order* LII., *r.* 4.

Where, on the hearing of a motion to set aside the award of arbitrators, it is found impossible otherwise to ascertain the material facts of the case, the Court can, and will, accede to an application by a party for leave to call the arbitrators as witnesses in regard to these facts.

CROSS-MOTIONS to set aside the award of arbitrators.

By an agreement dated November 28, 1932, and made between the Bristle and Merchandise Company, Ld., Marcus Schalit, and Ralph Leiserach, Schalit undertook to discharge all the liabilities of the company and to pay to it a sum of 10,000*l.*, and in consideration thereof the company agreed to transfer to Schalit all its assets ; and Schalit agreed to transfer to Leiserach 50 per cent. of the share capital of the company in consideration of Leiserach paying 5000*l.* to the company on Schalit's behalf.

By a subsequent agreement dated March 15, 1933, and made between the same parties, two named persons were appointed arbitrators for the purpose of ascertaining whether any further sum should be paid by either Leiserach or Schalit to the other on account of certain items respectively, and it was provided that any dispute between the parties touching the construction, meaning or effect of the agreement or any clause or thing therein contained or the rights or liabilities of the parties respectively under the agreement should be referred to the arbitrators or their umpire.

Disputes arose between Schalit and Leiserach as to certain matters and were referred by them to the arbitrators.

By their award made on July 18, 1933, the arbitrators determined that Schalit had a claim against Leiserach to certain sums in respect of differences arising out of the valuation of the stock of the company, certain profits, and an error in the amount of the stock, these sums amounting together to 2069*l.* 10*s.*; and that Leiserach had a claim against Schalit to certain sums in respect of errors in the balance-sheet of the company, these sums amounting together to 388*l.* 10*s.*

Leiserach gave notice of motion to set aside the award on the grounds that there was error of law on the face of the award, that the arbitrators had exceeded their jurisdiction in awarding as to matters not included in the submission, and that there had been technical misconduct of the arbitrators; and Schalit gave cross-notice of motion to set aside the award.

Affidavits were filed in support of the motion and cross-motion respectively, but these affidavits were to some extent contradictory in regard to the value of the company's stock and other matters of fact.

An application was made to the Court on behalf of Schalit for leave to call the two arbitrators as witnesses in regard to these disputed matters.

Croom-Johnson K.C. and *B. B. Stenham* (*Frank Whitworth* with them) for Schalit in support of the application: On a motion to set aside an award the Court has jurisdiction to allow the arbitrator to be called as a witness in regard to the matter which passed before him during the arbitration: see *In re Whiteley and Roberts Arbitration* (1), and *Buccleuch* (*Duke*) v. *Metropolitan Board of Works.* (2) On such an application Order LII., r. 4, does not exclude evidence other than evidence by affidavit.

Comyns Carr K.C. and *G. R. Mitchison* for Leiserach: The Court has no jurisdiction to grant this application. Though Order XXXVIII., r. 1, provides that upon a motion the Court may upon the application of either party order the attendance for cross-examination of a person who has made an affidavit, it does not provide that the Court may order the attendance as a witness of a person who has not made an affidavit. In *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (2) the proceeding was to enforce the award, and that case is no authority for the proposition that an arbitrator may be called as a witness in a proceeding to set aside his award.

HUMPHREYS J. This is a case in which the Court has listened to numerous affidavits, statements in some of which directly contradict the statements in others. It is also a case in which it is essential, in order to do justice, that the Court should be enabled to make up its mind as to the actual facts of the case. In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from a perusal of the affidavits on one side and the other—namely, what are the essential facts of the case. On that ground and on that ground only the Court accedes to the application to call as witnesses both the gentlemen who acted as arbitrators in the matter.

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(1) [1891] 1 Ch. 558.

(2) (1872) L. R. 5 H. L. 418.

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MACNAGHTEN J. I concur.

[The arbitrators were thereupon called as witnesses and examined by counsel on both sides. In the result the cross-motions to set aside the award were both dismissed.]

Solicitors for Mr. Leiserach: *Gasquet, Metcalfe & Walton.*
Solicitor for Mr. Schalit: *Samuel Sebba.*

J. R.

1934
June 20.

HILLMAN'S AIRWAYS, LIMITED *v.* SOCIÉTÉ ANONYME D'ÉDITIONS AÉRONAUTIQUES INTERNATIONALES AND OTHERS.

Defamation—Libel—Practice—Discovery—Newspaper—Name of printer—Interrogatory—6 & 7 *Will.* 4, *c.* 76, *s.* 19.

The right of a plaintiff who alleges that he has been libelled in a newspaper to obtain discovery "of the name of any person concerned as printer, publisher, or proprietor" of the newspaper, "or of any matters relative to the printing or publishing" thereof, provided by 6 & 7 Will. 4, c. 76, s. 19, still exists and, since the Judicature Acts, is enforceable by the administration of interrogatories, the procedure by bill of discovery specified in s. 19 of the statute having fallen into disuse.

APPEAL from Master.

The plaintiffs, Hillman's Airways Ld., brought an action against the defendants for damages for libel alleged to be contained in a newspaper entitled Inter Avia, dated December 28, 1933.

By their statement of claim the plaintiffs alleged that the first defendants, Société Anonyme d'Éditions Aéronautiques Internationales, were the proprietors and, jointly with the second defendants, R. F. Little & Co., the publishers of the newspaper. They also alleged that the second defendants were the printers of the newspaper.

By their defence the first defendants admitted that they had published the words complained of, but they did not admit that they were the proprietors of the newspaper or that the second defendants were the printers. The second defendants, by their defence, denied that they were the printers, publishers, or co-publishers of the newspaper.

In the course of the action the plaintiffs sought to administer to the first defendants the following interrogatory: "Were not the words complained of printed or lithographed by some person, firm, or company in the issue of Inter Avia for December 28, 1933? If yea, specify the name and address of such person, firm, or company."

Master Ball refused to order the first defendants to answer this interrogatory, and the plaintiffs appealed to the judge in Chambers. His Lordship adjourned the matter into Court for argument.

Nyholm-Shawcross for plaintiffs. The Master was wrong. Any information which before the passing of the Judicature Acts could have been obtained under 6 & 7 Will. 4, c. 76, s. 19 (1), by filing a bill of discovery (as was done in *Dixon* v. *Enoch* (2)), can now be obtained by interrogatories under the Rules of the Supreme Court: *Ramsden* v. *Brearley* (3); *Lefroy* v. *Burnside*. (4) [He also referred to *Orr* v. *Diaper* (5); Supreme Court of Judicature (Consolidation) Act, 1925, ss. 36, 42; and Spencer Bower on Actionable Defamation, Art. 51, s. 2.]

J. W. Morris for the first defendants. The Master was right. An interrogatory which is not relevant to any issue in the action in which it is asked, but which is asked merely to enable the plaintiff to institute proceedings against some third party, is not admissible under R. S. C., O. 31, rr. 1, 2, and cannot be asked. There is nothing in 6 & 7 Will. 4, c. 76, s. 19, nor in any of the authorities cited on behalf of the plaintiff to render such an interrogatory admissible. In the present action the question who are the printers of the newspaper is not in issue as between the plaintiffs and the first defendants.

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(1) By 6 & 7 Will. 4, c. 76, s. 19: "If any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; Provided always, that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made."

This section was re-enacted by the Newspapers, Printers, and Reading Rooms Repeal Act, 1869, s. 1, Sch. II.

(2) (1871) L. R. 13 Eq. 394.

(3) (1875) 33 L. T. 322.

(4) (1879) 41 L. T. 199.

(5) (1876) 4 Ch. D. 92.

DU PARCQ J. This summons raises a question of considerable importance. I have come to the conclusion that I cannot agree with the view which the Master took.

The plaintiffs base their claim to maintain this interrogatory on s. 19 of the statute 6 & 7 Will. 4, c. 76. The machinery of the Courts in 1836 was very different from that which exists to-day. It is no longer necessary or possible to file a bill to obtain discovery. Rules have been devised by which discovery can be obtained in the action itself.

By s. 19 of the Act of William 4, Parliament provided a means by which a person suing for defamation in a newspaper could discover the name of the printer, publisher, or proprietor of that newspaper that he might the more effectually carry on his action. No one can bring an action against an unknown person, and the Legislature provided a means by which any one who possessed information of matters relative to the printing or publishing of the newspaper could be compelled to disclose it. A difficulty arises when the legislation with which one has to deal was passed in a state of affairs which has ceased to exist.

Mr. Nyholm-Shawcross referred me to *Dixon* v. *Enoch* (1), a case in which Wickens V.-C. overruled a demurrer to a bill of discovery filed in pursuance of the section now relied upon, and ruled that by force of this enactment a person complaining of a libel in a newspaper might file a bill against the printer and publisher to ascertain the names of the proprietors for the purpose of bringing an action against the proprietors alone. That was decided in 1871. I was referred also to *Ramsden* v.

(1) L. R. 13 Eq. 394.

Brearley (1), which was decided after the passing of the Judicature Act, 1873. Lush J. there held that any information which could have been obtained by bill can now be obtained by discovery. That was an application under the same Act of William 4, and Lush J. put this question: "Can a plaintiff in an action brought in the High Court of Justice have the benefit of this enactment by any form of proceeding in the division to which the action belongs? . . . ." and he answered it in these words: "The proceeding by bill of discovery, pointed out by the Act of William 4, has . . . . been abolished; but the Judicature Acts were not intended to abolish, nor have they the effect of abolishing the right of discovery which it gives. That right still exists." There we see the Court looking at the substance of the right rather than at the form of the procedure. It would, indeed, be absurd to deprive people of rights merely because better methods of enforcing those rights have been devised.

A further very important decision is that of the Exchequer Division in Ireland in *Lefroy* v. *Burnside*. (2) That decision is, of course, not binding on me, but it has the great authority of Palles C.B. and I have no doubt about its correctness. *Lefroy* v. *Burnside* (2) was not identical with the present case, but it is very helpful. Had it not been for the Act of 1836 the defendant, who was alleged to be the proprietor of a newspaper, could have declined to answer, on the ground that the answer might incriminate him, an interrogatory inquiring whether he was the proprietor. Palles C.B. said: "It is admitted that at the time of the coming into operation of the Judicature Act the provisions of the 6 & 7 Will. 4, c. 76, s. 19, were in force as a substantive enactment of the 32 & 33 Vict. c. 24. At that time therefore a person alleging himself to have been libelled in a newspaper was entitled to appeal to the oath of the alleged proprietor, and the only way in which such application to the oath of the alleged proprietor could be made was under the 6 & 7 Will. 4, c. 76, by filing a bill for discovery. . . . . The substance of the right was the appeal to the oath of the alleged proprietor. The mode of asserting that right,

(1) 33 L. T. 322.

(2) 41 L. T. 199.

whether it was by bill of discovery in equity or by interrogatories at common law, was matter of form and procedure only. Then came the Judicature Act, and in my opinion the effect of that Act upon a question like the present was to leave unaffected the right, but to alter the form and procedure by which that right might be enforced." I adopt that language, and I am satisfied that I ought to concern myself, not with machinery, but with the substance of the right.

The plaintiffs are entitled to have the information for which they ask on oath if they can bring themselves within s. 19 of the Act of William 4. The action is one in which they claim damages for libel. The first defendants admit that they were responsible for publishing the words complained of, but the plaintiffs want also to know who were the printers. I think that the plaintiffs will be in a position more effectually to carry on their action if they have that knowledge, just as in *Lefroy* v. *Burnside* (1) the plaintiffs were entitled to ask whether the defendant was the proprietor or whether there were other proprietors, and the Court, therefore, may properly say that the first defendants must disclose who are the printers if they know them.

It is contended by Mr. Morris that an interrogatory not directed to an issue in the action cannot be asked. That is true in the ordinary case, but here the Act of Parliament deals specifically with the matter. It is true that the Courts do not as a rule allow interrogatories to be asked to enable persons to carry on actions against some one else, but Parliament has provided that that general rule shall not apply in this particular instance.

In my opinion, therefore, this appeal must be allowed.

Appeal allowed.

Solicitor for plaintiff: *W. Daybell.*

Solicitors for first defendants: *Beaumont & Son.*

G. F. L. B.

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(1) 41 L. T. 199.

TIMMINS *v.* BRODSWORTH MAIN COLLIERY COMPANY, LIMITED.

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1934
May 30;
June 8.

Workmen's Compensation—Industrial Disease—Certificate of certifying surgeon—Subsequent return to work—Second Certificate of certifying surgeon in respect of same Disease—Date of Disablement not stated in either Certificate—No right after second Certificate to claim Compensation under first Certificate—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-ss.* 1, 2.

A miner, after obtaining in 1928 the certificate of a certifying surgeon that he was suffering from miner's nystagmus and was thereby disabled, was in 1932 able to return to his old work for nearly a year, but thereafter obtained a second certificate that he was suffering from the same industrial disease and was thereby disabled. Neither certificate expressly fixed a date for the commencement of disablement, so that under s. 43, sub-s. 2, of the Workmen's Compensation Act, 1925, the disablement was in each case treated as commencing on the date of the certificate. After he had obtained the second certificate the workman commenced proceedings for compensation on the basis of the first certificate, his claim being that he was suffering from a recrudescence of the old trouble. The county court judge held on the evidence that this was so. On appeal:—

Held, by the Court of Appeal (Slesser L.J. dissenting), that as under s. 43 the certificate of a certifying surgeon was conclusive of the date of disablement, and the disablement was to be treated as the happening of an accident, the county court judge was debarred after the workman had obtained the second certificate from holding on evidence that the disablement was caused by a recrudescence of the old trouble.

Wilsons & Clyde Coal Co. v. *Flynn* [1930] A. C. 516 applied.

Appeal from the judge of the Doncaster County Court.

A workman called Jesse Timmins was employed by the Brodsworth Main Colliery Company, Ld., as a coal miner before April 17, 1928, when he obtained the certificate of a certifying surgeon that he was suffering from miner's nystagmus, an industrial disease under the Workmen's Compensation Act, 1925. The certificate stated no date for the beginning of the disablement and therefore under s. 43, sub-s. 2, of the Act the disablement was treated as beginning on the date of the certificate. The workman's average wages before the disablement were 3*l.* 3*s.* 11*d.*, and compensation was therefore paid to the workman at 30*s.* a week until September, 1929, when he went back to try his old work. He worked till January, 1930, when his eyes became worse, and he was

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again paid compensation at the full rate till October, 1930. From then till January, 1932, he was given work on the surface, and he then resumed his old work and continued to do it till November 26, 1932, when he had to cease work for six weeks owing to a septic throat. His eyes were also giving trouble again, and on January 7, 1933, he obtained a new certificate from the same certifying surgeon that he was suffering from miner's nystagmus. The date of disablement was again not stated. During the last period of work before this disablement the man's average wages were 2*l.* 9*s.* 2*d.*, a sum which would entitle him to compensation during total disablement at the rate of 24*s.* 7*d.* a week. The secretary of the Miners' Association made a claim on behalf of the workman based on the second certificate ; but on November 17, 1933, the workman commenced arbitration proceedings based upon the first certificate and claiming that he was suffering from a recrudescence of the old trouble and not from a new attack of the disease, and he therefore claimed compensation at the rate of 30*s.* a week instead of at the rate of 24*s.* 7*d.* a week only.

Evidence was given before the county court judge by the workman, who said that his eyes had never entirely recovered, and by a doctor who, while admitting that he had never examined the workman, expressed the opinion, having regard to the workman's evidence, that he was suffering from a recrudescence of the original attack of the disease.

No evidence was called by the respondents, who relied on the certificate of January 7, 1933, as fixing the date of disablement and showing conclusively that the workman was suffering from a new attack of the disease.

The employers by their answer submitted to continue payment of compensation at the rate of 24*s.* 7*d.* a week.

The county court judge said that in his view the workman was entitled to have his compensation based upon the wages which he had been earning at the date of the first certificate, notwithstanding the existence of the second certificate.

At first sight *M'Dougall* v. *Summerlee Iron Co.* (1) seemed

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(1) (1927) 20 B. W. C. C. 419.

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to offer an easy way out of the many difficulties connected with nystagmus by indicating that disablement is the only thing to be considered and that each fresh onset of incapacity constituted a new accident; but this case had to be read in the light of later cases, and Lord Warrington, who was a party to it, referred to it in *Penrikyber Navigation Colliery Co.* v. *Edwards* (1) as a case where there had been complete original recovery. It remained a question of fact in this case whether the workman had completely recovered from the original attack of the disease or had been left with an added probability of a recurrence owing to the fact that the original conditions caused by the attack had not completely passed away, as in *Connor* v. *Cadzow Coal Co.* (2) That was the position when the workman obtained the second certificate, and so far as the actual findings of the certifying surgeon were concerned the question was still left open, because all he found was that the workman was suffering from nystagmus. To found a claim for compensation, however, there must be disablement as well as disease, and the statute provided that, when the certifying surgeon could not certify the date of disablement, it was to be the date of the certificate. It was argued that the certificate thereby became a finding that the old disablement had ceased and with it all consequences of the original notional accident, and that the new disablement constituted a new accident. He could not accept this argument. In his opinion the statute in thus fixing the date of disablement did so without prejudice to the question whether it was or was not a recurrence of an earlier disablement. In his view, therefore, it still remained a question of fact whether there had been a complete recovery from the first accident, and he was strengthened in this view by *Meredith* v. *Ebbw Vale Steel, etc., Co.* (3) On the evidence that there had been no complete recovery, the disablement being a recurrence of the original attack of the disease.

The employers appealed. The appeal was heard on May 30 and judgment given on June 8, 1934.

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(1) [1933] A. C. 28, 49; 25 B. W. C. C. 303.

(2) [1932] A. C. 1; 24 B. W. C. C. 396.

(3) (1925) 18 B. W. C. C. 251.

Edgar Dale for the appellants. The date of disablement is established by the second certificate and any evidence of difficulty of working before that date ought to have been excluded. The evidence that the workman was suffering from a recrudescence of the original attack of the disease and not from a new attack of the disease was therefore inadmissible. By s. 43, sub-s. 2, the certificate of the certifying surgeon is made conclusive of the date on which the disablement commenced, and if he is unable to certify a date, as in this case, the date of the certificate must be treated as the date of disablement. The workman is therefore only entitled to compensation calculated on the footing of his average weekly earnings before the date of disablement so ascertained. It is to be remembered that under s. 43, sub-s. 1 (*a*), "the disablement . . . . shall be treated as the happening of the accident" for the purpose of entitling the workman to compensation under the Act. It is the accident which entitles the workman to compensation, and therefore evidence of the earlier disablement could not be given: *Wilsons & Clyde Coal Co.* v. *Flynn* (1). *Connor* v. *Cadzow Coal Co., Ld.* (2), was not the case of a second certificate of disablement, but an original certificate was followed by a certificate of the medical referee, and the question was whether that certificate meant that the workman had fully recovered. Here, however, the workman had returned to work for nearly a year, and then asked for and obtained a new certificate on the basis that a new disablement which is the equivalent of a new accident had happened. In *Penrikyber Navigation Colliery Co.* v. *Edwards* (3) there had been a certificate of disablement followed by a certificate of the medical referee that the workman had recovered. Then followed a second certificate of disablement dating the disablement back to the first certificate. The whole question turned on the effect of the medical referee's certificate which was ultimately found to mean that the workman had fully recovered. In these circumstances no effect could be given to the second certificate.

(1) [1930] A. C. 516, 522.
(2) [1932] A. C. 1; 24 B. W. C. C. 396.
(3) [1933] A. C. 28; 25 B. W. C. C. 303.

Both these cases differ from one where a man, after obtaining a second certificate with a new date of disablement, seeks to refer his claim to the first certificate. The view that it is impossible to go behind the second certificate receives support, however, from *M'Dougall* v. *Summerlee Iron Co.* (1): see also *Meredith* v. *Ebbw Vale Steel Co.* (2)

J. Neal for the respondents. No doubt there must be presumed to have been two notional accidents on the respective dates of the two certificates, but the fact of a second accident cannot prevent the workman from relying on the first and saying his disablement is due to that accident provided he can establish it by evidence. There is nothing in the fact that a new date of disablement is fixed by reference to the date of the second certificate to prevent the workman from saying that he is suffering concurrently from the earlier notional accident. For reasons of convenience a notional idea was imported into the second certificate by statute, but the certificate is not to be treated as saying that there was no disablement before its date: *McNicholas* v. *West Leigh Colliery Co.* (3)

The object of making the date fixed by the certificate conclusive is to determine the date of that notional accident and not to say whether the earlier accident had ceased. This contention receives support from *M'Dougall* v. *Summerlee Iron Co.* (1)

[SLESSER L.J. *Meredith* v. *Ebbw Vale Steel Co.* (2) is the closest to the present case, but authorities are not of much assistance.]

In the absence of authority the Court must have regard to the principles governing this case, and on principle there is no reason why, when there have been two accidents the workman should not recover compensation in respect of the first accident on proper evidence: *Hutchinson* v. *Kiveton Park Colliery Co.* (4)

Further, mere stoppage of the payment of compensation does not prove that the workman has fully recovered.

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(1) 20 B. W. C. C. 419.

(2) 18 B. W. C. C. 251.

(3) (1933) 26 B. W. C. C. 29, 43.

(4) [1926] 1 K. B. 279.

[LORD HANWORTH M.R. The overt act of returning to work is sufficient to show that the workman has fully recovered.]

It may be that without the second certificate, it could not be argued that the man had not fully recovered; but it is nowhere said that a second certificate will prevent the workman from saying that he is still suffering from the effects of the old accident. No case is made out here of an estoppel.

Edgar Dale replied.

Cur. adv. vult.

June 8. LORD HANWORTH M.R. This is an appeal by the employers from an award given by the county court judge at Doncaster on March 8, 1934, whereby he awarded compensation at the rate of 30*s.* a week to the workman. The employers contend that the rate should be 24*s.* 7*d.* and no more.

The divergence between these two sums depends on the rate of the pre-accident earnings of the workman. In 1928 they were 3*l.* 3*s.* 11*d.* In 1933, when the workman was back at full work under these same employers, his average wages were 2*l.* 9*s.* 2*d.*, the rate having fallen meantime. The question is which rate is to be taken for determining the compensation to be paid to the workman, in other words, what was the date of the accident under which the liability of the employers now arises.

On April 17, 1928, Timmins was given a certificate by the certifying surgeon of the district, that he was suffering from miner's nystagmus and was "thereby disabled from earning full wages at the work at which he has been employed." The surgeon struck out the clause under which he could have inserted a specified date as the commencement of the disablement, and so under s. 43, sub-s. 2, the date on which the disablement commenced was the date of the certificate, April 17, 1928. He was paid the full compensation due thereunder—namely, 30*s.* a week based upon his earnings before April 17, which were 3*l.* 3*s.* 11*d.* a week and so justified the full payment allowed. He did some work, intermittently, down to January, 1932, when he was able to go down the pit, and he resumed his old work until November 26, 1932, that is for forty-five weeks. During that time his average weekly earnings, on full work, were *2l. 9s. 2d.*, which would result in a weekly payment of *24s. 7d.*, being the correct sum for compensation if that span of work is to be regarded as demonstrating his pre-accident earnings.

On November 26 he left work for six weeks with a septic throat, and once more symptoms of nystagmus returned. On January 7, 1933, he was examined and was given a certificate by the same certifying surgeon "that he is suffering from a disease to which the Workmen's Compensation Act applies, namely, the disease mentioned in the Schedule below against which I have placed my initials," that is, miner's nystagmus. He again crossed out the clause in the printed form provided for the certificate, which gave an opportunity for the insertion of a particular date of the commencement of the disablement. Hence under sub-s. 2 this disablement commenced on the date of the certificate, January 7, 1933, and the average earnings before this disablement were, as already stated, *2l. 9s. 2d.* The secretary of the Miners' Association put forward this certificate and made a claim based upon it on behalf of Timmins, giving January 7, 1933, as the date of the accident.

On November 17, 1933, the present arbitration proceedings were commenced, based upon the first certificate of April 17, 1928, to decide the questions that had arisen with the respondents; and the sole question that remains for decision is as to the amount of the compensation payable by the respondents.

It is admitted in the application that all compensation to which the applicant was entitled was paid up to January 7, 1933; also that thereafter he was paid at the rate of *30s.* a week to May 4, 1934, when the respondents reduced the payments to *24s. 7d.*; and they are continuing to make payments at this latter rate. The larger payments from January 7 to May 4 were made by inadvertence and do not affect the point to be decided. The figures are agreed and can be easily adjusted, but the question is, what was the date of the disablement which is to be regarded for the purpose of measuring the compensation payable ?

The learned judge has found that "the initial incapacity to earn full wages ceased in January, 1932, if not in September, 1929," when in fact the workman returned to work for some months until January, 1930, but then had to give up. But he holds upon the evidence given at the trial that there was a question of fact whether the workman had completely recovered from the earlier attack, or had been left with an added probability of a recurrence owing to the original condition caused by the attack not having passed away completely, as in *Connor* v. *Cadzow Coal Co.* (1) On the evidence he finds that there had been no complete recovery, and that the present disablement is a recurrence of that which constituted the original notional accident. Can the judge set aside the second certificate, and treat the matter as one of fact upon which he can reach his own conclusion upon the evidence of a medical man who had not examined the miner and gives his expert opinion upon the materials submitted to him ? The learned judge disposes of this difficulty by holding that although the second certificate was obtained and a claim made upon it, it was procured for the purpose of supporting the claim under the first accident, and that Timmins used it only for that purpose, and thus that he is not prevented from claiming compensation on the footing that his present disability results from his first accident. In fact Timmins did not rely on the second certificate at all in these proceedings, but it was relied upon by the respondents in their answer.

It is necessary to look a little closely at s. 43. By it, compensation is given to the workman for disablement arising from certain industrial diseases "due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement." The date of disablement is therefore of importance from the employer's point of view in identifying

(1) [1932] A. C. 1.

those who are to pay the compensation. By sub-cl. (*e*) of sub-s. 1 the employer to whom notice of the death, or disablement, is to be given " shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due." By sub-cl. (*f*) an employer who is aggrieved by the action of the certifying surgeon in giving a certificate has a right of appeal to a medical referee. By sub-s. 2, the date of disablement, important for the reasons given above, is not left to any uncertainty. It is directed that " for the purposes of this section," in all its parts, the date is to be the one specified by the surgeon, or failing that, the date of the certificate. The proviso deals with other possibilities, and clears up any uncertainty as to what shall be the date of disablement in those vicissitudes.

Next I think it is important to remember that these industrial diseases are brought within the purview of the Act, and made the foundation of a payment of compensation " under this Act as if the disease . . . . were a personal injury by accident arising out of and in the course of that employment " subject only to certain and limited modifications. If the disablement is an accident, there are many sections applicable on the hypothesis that recovery, total or partial, from the accident may supervene. For instance, under s. 11 there may be a review of the weekly payment, or an employer may stop the compensation when the workman has actually returned to work, under s. 12, sub-cl. 1. These facilities or rights are applicable to cases where the compensation is payable in consequence of disease not less than when it is payable from a physical injury.

It appears to me that it is for such purposes that the date of disablement is made so definite and easily determined. In *Wilsons & Clyde Coal Co.* v. *Flynn* (1) it was held that the date of disablement is that which the certifying surgeon finds. In that case Lord Hailsham said (2): " I cannot hold that it is competent for the arbitrator to find that the date of disablement should be some other date than that certified

(1) [1930] A. C. 516.

(2) Ibid. 522.

by the certifying surgeon, or that he can hear evidence to ascertain for himself a fact whose determination is by statute expressly left to the certifying surgeon. Further, the fact that the sub-section provides that if the certifying surgeon is unable to certify the date on which disablement commenced then that date shall be the date on which the certificate is given, seems to me wholly inconsistent with the view that it shall be a date to be ascertained by the arbitrator upon evidence adduced before him."

The certificate is conclusive as to the nature of the disease and the date of disablement, though that does not preclude the employers from giving evidence that the disease was not contracted in their employment, as in *Needham* v. *Ace Mill, Ld.* (1), or that death did not result from the disease (see *Young* v. *Keeble, Ld.* (2)), as to which the onus lies on the defendants. Thus in *Bedford* v. *Cowtan & Sons, Ld.* (3), the doctor certified that the workman suffered from lead poisoning and there was no appeal by the employers. Later, the man was examined, and the doctors held that he was suffering from a disease not within the Act, and the county court judge agreed with them; but he held that he was bound to hold that the certificate fixed the nature of the disease, and, therefore, he must hold that the incapacity was due to lead poisoning. It was held that the certificate was in the circumstances conclusive. Lord Cozens-Hardy said (4): "It is of course open to the employer to prove that the certified disease from which the man was suffering, and by which he was disabled at the date of the certificate, has since ceased, and that such disablement as now exists is due to some other cause. In other words, he may shew that a new cause has come into operation, but that is all he can do."

The same principle was laid down in *M'Dougall* v. *Summerlee Iron Co.* (5), when there was disablement under a certificate of 1923 and a complete discharge given to the employers for their liability under it to the workman. There followed

(1) (1928) 21 B. W. C. C. 189.
(2) (1928) 21 B. W. C. C. 294.
(3) [1916] 1 K. B. 980; 9 B. W. C. C. 208.
(4) [1916] 1 K. B. 986.
(5) 20 B. W. C. C. 419.

a fresh certificate in 1925 in which the date of disablement was fixed as September 11, 1925, that is subsequent to the discharge of the employer's previous liability. It was held by the county court judge and by the House of Lords that this certificate governed the liability of the employers, to the exclusion of the decision of the Court of Session, which had had regard to, and given effect to, the conclusion of the Sheriff-Substitute that "it is practically certain that some traces did remain of the previous attack but that they did not disable him from earning full wage."

Connor v. *Cadzow Coal Co.* (1) coincides with these decisions. In that case the House of Lords referred the case back to the medical referee to ascertain from him whether he had intended to certify that the workman had completely recovered from the attack in the sense that he was not after the attack more susceptible to the disease than he had been before it, because on the materials before the House the certificate was not one of complete recovery in the full sense. (2) The referee answered that the workman had not completely recovered in that sense, and the House of Lords gave effect to that opinion of the referee.

There is no such material in the present case. The second certificate struck out any other date, and left its own date as the date of the disablement. That certificate was given after the workman's return to work, which was an overt act indicating that the effects of the first accident had passed away.

In *Connor's* case (1) Lord Buckmaster says (2): "In the case of a complete recovery, the second attack must be regarded as an independent accident, and this is made plain in the judgment of Lord Warrington in the case of *M'Dougall* (3)," and see per Lord Thankerton. (4) In *Connor's* case (1) the medical referee was dealing with the measure of recovery of the workman and his fitness for his ordinary work. In the present, the surgeon is dealing with a man who had returned to work, and who asks for a fresh certificate,

(1) [1932] A. C. 1.
(2) Ibid. 5.
(3) 20 B. W. C. C. 419.
(4) [1932] A. C. 12; 24 B. W. C. C. 409.

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after an intervening period of full work had supervened, that is on the basis that the equivalent of a fresh accident had happened. I can find no authority which entitles the Court to reopen the question on evidence generally, and apart from the certificate of the certifying surgeon which was not equivocal.

Meredith v. *Ebbw Vale Steel Co.* (1) in my opinion confirms this view. The decision upheld the county court judge, who adhered to the latest certificate. This attitude was affirmed to be correct in *Wilsons & Clyde Coal Co.* v. *Flynn.* (2) The reservation made by Atkin L.J. in his judgment (3) is, I think, to be treated as a reservation and no more. *Connor's* case (4) illustrates the occasion suggested in the words of the Lord Justice, but yet *Wilsons & Clyde Coal Co.* v. *Flynn* (5) must also be respected and followed.

The words of Lord Warrington in *M'Dougall's* case (6): "the material circumstance is that the disablement, which is essential to the accident, had ceased" were accepted by Lord Buckmaster in *Connor's* case (7), and confirm the view that I have presented as to the importance of the date of disablement. I cannot hold that the workman may elect to rely upon the certificate that suits him best without reference to the rights and liabilities thereby imposed upon the employers. In other words, the facts of the case as a whole must be regarded. For these reasons—while I regret to find that I am not in accord with Slesser L.J.—in my judgment the appeal ought to be allowed, and the award altered so as to be in accord with the submission of the appellants—namely, for the sum of 24*s.* 7*d.* a week. The respondents to the appeal must pay the costs here and below.

SLESSER L.J. On November 17, 1933, the workman applied for an arbitration in respect of an alleged disability from earning full wages at the work at which he was employed caused by the disease of miners' nystagmus.

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(1) 18 B. W. C. C. 251.
(2) [1930] A. C. 516.
(3) 18 B. W. C. C. 265.
(4) [1932] A. C. 1.
(5) [1930] A. C. 516.
(6) 20 B. W. C. C. 419, 429.
(7) [1932] A. C. 1, 5.

He gave as the date of his disability April 17, 1928, at which time his agreed average weekly earnings during the twelve months previous to the date of disability had been 3*l*. 3*s*. 11*d*. On April 17, 1928, he had received a certificate from the certifying surgeon that he was suffering from miner's nystagmus and was disabled from earning full wages at the work at which he had been employed. The surgeon did not certify the date on which the disablement commenced, and, consequently, the date under s. 43, sub-s. 2, of the Workmen's Compensation Act, 1925, is to be taken as the date of the certificate. Although the applicant, between the date of this certificate and the date of the application for arbitration, had returned to work several times, sometimes at full wages and sometimes at wages together with compensation, the learned county court judge has found as a fact that the present disablement is a recurrence of that disease which constituted the original notional accident, and that there has been no complete recovery.

On this finding, in accordance with the decision of the House of Lords in *Connor* v. *Cadzow Coal Co.* (1), there could be no question but that, save for the matters hereafter stated, the workman would be entitled to rely upon the original certificate of April 17, 1928, and consequently to claim that his average weekly earnings under ss. 9 and 10 of the Act should be computed on the basis of the weekly earnings which he was earning at the time of the notional accident, namely, April 17, 1928, and the learned judge has in fact found that he is entitled to have his compensation so based upon those wages.

The employers are constrained to admit that, if there were no other factors present in this case, they could not dispute this method of assessment. But they rely upon the fact that, after the workman had returned to work at full wages on the coal face, on January 14, 1932—and after he had worked there for forty-five weeks—he had obtained a second certificate dated January 7, 1933, signed by the same certifying surgeon, which certificate also does not date the

(1) [1932] A. C. 1.

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time when the disablement commenced, which, therefore, must be taken under the statute to be a certificate that the disablement began on January 7, 1933. They say that this certification that the disablement commenced on January 7, 1933, is not consistent with the effect of the earlier certificate that the disablement commenced on April 17, 1928; that the later certificate is conclusive and must prevail to the exclusion of the earlier certificate, and that as at the date of the later certificate the average weekly earnings were considerably less, the result follows that the compensation should be not 30*s.* but 27*s.* 4*d.* per week.

Strictly, if the employers' contention is correct that the workman can no longer rely upon his first certificate at the time of his application for compensation, then, in so far as he has based his claim upon the first certificate only, they are not liable to pay 24*s.* 7*d.* a week, but should succeed altogether in the arbitration, because the workman has not thought fit to base his claim upon the second certificate at all, and, without amendment, if the claim on the first certificate fails, the whole claim goes. But the respondents have submitted to an award of 24*s.* 7*d.* per week by their answer.

The employers have not thought fit to obtain from the medical referee any certificate of complete recovery, and rely, first, on the fact that during 1932 the workman in fact returned to work at full wages, and, alternatively, upon the inferential effect of the second certificate, which they allege now dates the time of the only certificate of disablement on which the workman can rely as being a disablement from January 7, 1933.

The fact that the employers have not thought fit to obtain a certificate from the medical referee under s. 12 of the Act is, to my mind, a fact of importance in this case. The effect is to throw upon the learned judge the duty of deciding, in the language of Lord Buckmaster in *Connor's* case (1), whether "complete recovery cannot be asserted."

It is true that during a considerable period of 1932, from January to November, the workman was back in the pit at full wages, and it has been suggested that on his return to the pit his disablement ceased, and consequently the earlier certificate of disease and disability became null. For certain purposes, such as a subsequent reliance upon a certificate given before recovery when the disease recurs, the earlier certificate may be kept alive, notwithstanding that there follows a certificate of fitness for ordinary work.

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(1) [1932] A. C. 6.

In *McNicholas* v. *West Leigh Colliery Co.* (1) a miner who had been certified as being disabled by miner's nystagmus in 1928 was certified by the medical referee to be no longer suffering from nystagmus and to be fit for his ordinary work in 1931. The medical referee on inquiry from the Court of Appeal stated that there was a probability of the recurrence of nystagmus being a repetition of the nystagmus certified in 1928, and such a finding was held by this Court to justify a declaration of liability as from 1928, and this notwithstanding that the medical referee had certified that there was at the time of his certificate no actual disablement for which reason the workman was deprived by this Court of the compensation which had been awarded to him. *M'Dougall's* case (2), which certainly at first consideration appears to decide that where disablement has come to an end, as proved by the fact that the workman had earned full wages for a period, a fresh disablement duly certified is to be regarded as a fresh injury by accident, is commented upon in *Connor's* case. (3) Lord Buckmaster says (4): "In the case of a complete recovery, the second attack must be regarded as an independent accident"; and Lord Warrington, speaking of *M'Dougall's* case (2), says (5): "The workman had there been disabled by nystagmus, he had been fully compensated by payment of a lump sum and had been certified as having completely recovered. He was again attacked by the disease and obtained a fresh certificate of disablement. All that this House decided was that this disablement was a fresh injury by accident, and I cannot see that this has any

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(1) 26 B. W. C. C. 29.
(2) 20 B. W. C. C. 419.
(3) [1932] A. C. 1.
(4) Ibid. 5.
(5) Ibid. 8.

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bearing on the present case." In *Connor's* case (1), unlike *M'Dougall's* case (2), the workman was receiving compensation at the time when he was certified by the medical referee to have recovered, and, therefore, as Lord Thankerton says (3): "In the present case the certificate does not establish that the disablement has ceased, and if the appellant were to be disabled by a fresh attack from earning full wages, the arbitrator might be entitled to hold that it was still due to the original disablement." He quotes a decision of the House in *Richard Evans & Co.* v. *Scahill* (4), where a medical referee gave a certificate in February, 1925, that the plaintiff was not suffering from nystagmus, though in 1923 and in August, 1924, he had been certified to be so suffering, and in July, 1925, after the certificate of recovery, the workman obtained a fresh certificate that he was then suffering and was disabled. It was held that the certificate of February, 1925, did not certify that the workman had recovered from the original attack, and that therefore, the arbitrator was not precluded from following the earlier certificate of 1923 and holding that the workman was then suffering from the disease which he had contracted in 1923, though it will be noted that from February, 1925, to July, 1925, he was, by virtue of the certificate of February, 1925, found at that time not to be disabled.

This case was also mentioned by Lord Dunedin in *Penrikyber Navigation Colliery Co.* v. *Edwards* (5), where he says (6): "It was argued that the first certificate "—that of January, 1925, when the medical referee gave a certificate that the workman was not suffering from miner's nystagmus—" barred the way to all future proceedings in respect of the original attack. The House, confirming the judgment of the Court of Appeal, held that it did not." And, again, Lord Warrington points out (7) that in *M'Dougall's* case (2) the man had been certified to have completely recovered from the original attack.

The case of *Prendergast* v. *Lancaster's Steam Coal Collieries*

(1) [1932] A. C. 1.
(2) 20 B. W. C. C. 419.
(3) [1932] A. C. 12.
(4) (1927) 20 B. W. C. C. 348.
(5) [1933] A. C. 28.
(6) Ibid. 37.
(7) [1933] A. C. 49.

Ld. (1) was very similar to *Evans*' case (2) as to its facts. A certificate of 1917; a further certificate by the medical referee of recovery in 1924, and a further decision of a medical referee that the man was again suffering from a recurrence of the 1917 disease. The county court judge held that the certificate of 1924 of recovery was conclusive only of the matters referred to at the time, and not res judicata between the parties. This case was approved by the House of Lords in *Richard Evans & Co.* v. *Scahill.* (2)

The present case from this view seems even less in favour of the employers, for here, as I have said, there is no certificate of recovery and fitness to earn full wages at all, but only an actual earning of such wages in fact. No question of the conclusiveness of a certificate of recovery therefore arises, and, assuming the first certificate is still available to the workman, its conclusiveness cannot be contradicted in my view merely by a de facto return to work at full wages, which may be merely experimental. Were it not so, no workman could safely return and try his old work at full wages without the danger of imperilling his previous certificate.

Of the two possible views considered by Romer L.J., whose judgment I have read, I think that the result of all these cases is that the second one is right, namely, that "the first notional accident continues its notional existence so long as the personal injury which it was deemed to have caused, continues to exist, that is to say, until the workman has completely recovered from the disease."

There remains the second argument for the employers, that the second certificate has concluded the matter by fixing the date so found by omission of certification as the date of the notional accident. The workman does not here found his case upon this second certificate at all, and, save as a part of the history of the case, it is not relied upon in his claim.

The problem which falls to be considered is stated by Atkin L.J. in *Meredith* v. *Ebbw Vale Steel Co.* (3) as follows:

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(1) (1925) 18 B. W. C. C. 494. (2) 20 B. W. C. C. 348.
(3) 18 B. W. C. C. 251, 265.

"The learned judge, I think, has come to the conclusion that where there are two certificates it follows as a matter of law that the second certificate prevails, and, if the second certificate gives the date of the commencement of the disability, that that must necessarily be the date of the accident from which the workman can afterwards claim his compensation, and that only. I am not prepared to decide that point. It occurs to me that there may well be cases in which, a certificate having been obtained, the workman may be able to satisfy the county court judge that it was necessary to obtain a second certificate to show that in fact he was suffering from a disability which was the original disability originally certified by a former certificate."

In *Richard Evans & Co.* v. *Scahill* (1) it will be noted that although the workman was certified in 1923 and again in 1924, the arbitrator was held by the House of Lords to be entitled to hold that in 1925 the workman was suffering from the disease certified in 1923.

Under s. 43, sub-s. 1, where the conditions there stated are satisfied, it is provided that the workman "shall be entitled to compensation under this Act as if the disease . . . . were a personal injury by accident"; and "(*a*) the disablement . . . . shall be treated as the happening of the accident." Now, therefore, though both certificates are conclusive as to the date of the disablement—*Chuter* v. *Ford & Sons, Ld.* (2)—the conclusiveness is only in respect of the statutory contents of the certificate (per Lord Sumner in *Richard Evans & Co.* v. *Scahill* (3)), and, consequently, it was here open to the employers to show that the disability in 1933 was one which occurred after a complete recovery, and that it was not the consequence of the original notional accident in 1928. In fact, this is what the employers attempted to do and failed; they could not bring the case within that class of case of which *Penrikyber Navigation Colliery Co.* v. *Edwards* (4) is a leading example; but, as I have said,

(1) 20 B. W. C. C. 348.
(2) [1915] 2 K. B. 113; 8 B. W. C. C. 160.
(3) 20 B. W. C. C. 348, 353.
(4) [1933] A. C. 28.

the workman established recurrence from the original accident within the principle of *Connor's* case. (1)

In these circumstances, I think that the proper way in which to regard the matter is to treat both certificates as valid and subsisting, for both are conclusive (*Wilsons & Clyde Coal Co.* v. *Flynn* (2)) and cannot be challenged in proceedings —namely, that they show respectively a notional accident with continuous effects dating from 1928, and a second notional accident dating from January 7, 1933, the results of both of which can properly be said to have produced the present disability. Regarding these dates as the dates of the happenings of the notional accidents, if this were a disability arising from actual accident within the meaning of s. 1 of the Act, assuming that there was no novus actus interveniens, and the two accidents had produced incapacity for work, as was the case in *Brown* v. *Kemp* (3), the workman would be entitled to rely upon the earlier accident, as in that case. In the language of Scrutton L.J. in *Saddington* v. *Inslip Iron Co.* (4): "If the accident partially causes the incapacity it does not matter that some other cause has come in and increased the incapacity by acting on the incapacity caused by the accident. It appears to me the latter proposition is laid down most fairly by this Court in its considered judgment in *Brown* v. *Kemp* (3), where a man damaged his knee and then in the hospital contracted scarlet fever, the germ not entering through the knee but presumably through the ordinary course of infection, the mouth, and so on. But the result of the scarlet fever was to increase the injury to the knee making it permanently stiff, and yet the incapacity caused by that permanent stiffening caused by the scarlet fever was held the result of the original accident."

In my opinion, it is enough here for the workman to elect to rely upon his extant and valid certificate of 1928, and it matters not to him that another certificate testifies to another contributing cause to the incapacity dating from 1933.

It is said that such a conclusion is prejudicial to the

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(1) [1932] A. C. 1.

(2) [1930] A. C. 516.

(3) (1913) 6 B. W. C. C. 725.

(4) (1917) 10 B. W. C. C. 624, 634.

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employer. I would point out that the workman in deciding to base his case upon the 1928 certificate was incurring the risk that the judge might very well have come to the view that his condition at the time of the application could not be the result of the earlier accident, in which case, without amendment, he would have wholly failed.

He elected to take this risk, and the employer is really no worse off than is every employer who once employs a man who has incurred miner's nystagmus in his service, against whom it may subsequently be found, however long afterwards, according to *Connor's* case (1), that the recrudescence of disability is due to long anterior employment, and is not protected by the appropriate statutory provisions.

I think that this appeal fails.

ROMER L.J. This appeal raises a question of some difficulty as to the true construction and effect of s. 43, sub-ss. 1 and 2, of the Workmen's Compensation Act, 1925. The first of those sub-sections so far as material to the present purpose provides as follows: "Where—(i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed . . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modification:—(*a*) The disablement or suspension shall be treated as the happening of the accident." By the second sub-section the date of disablement is for the purpose of the section "such date as the certifying surgeon certifies as the date on which the

(1) [1932] A. C. 1.

disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given."

Now it is to be noticed that the occurrence of the disease is not of itself treated by the section as an accident or as a personal injury resulting from an accident. A workman cannot, when the first symptoms of it appear and before disablement occurs, obtain a declaration of liability. Nor is the subsequent disablement treated as being an accident resulting in the personal injury which is the disease, and for a very good reason. The personal injury precedes and causes the disablement. The truth is that the section does not require that any specified thing shall be regarded as an accident. It merely provides that when the disease results in the disablement, and this fact is certified by the certifying surgeon, the workman is entitled to be compensated as though an accident had befallen him at the date or assumed date of the disablement, although no such accident in fact took place, and as if such accident had caused a personal injury, that is to say, the disease, which, of course, it could not have done in fact. The accident, the personal injury, and the disablement are all treated as happening at the same time, and the workman is to be compensated on that footing.

So far there seems to be no difficulty, and the workman will continue to receive compensation so long as his disability lasts. But now suppose that the disablement ceases. If the disease ceases at the same time, again there will be no difficulty. But if, as frequently happens, the disease continues after disablement has ceased, a problem of great difficulty arises.

Two views appear to be possible. One is that, just as before disablement occurred there was no notional accident, so after disablement has ceased, the notional accident ceases its notional existence. Should disablement subsequently return, a fresh certificate would have to be obtained from the surgeon. Thereupon the workman would again be compensated as though another accident had taken place at the date or the assumed date of the second disablement causing a new personal injury. This view, as pointed out by the learned county court judge in the present case, would, if it prevailed, simplify considerably the working of the section.

The other view is that the first notional accident continues its notional existence so long as the personal injury, which it was deemed to have caused, continues to exist, that is to say, until the workman has completely recovered from the disease. In that case no further certificate of the surgeon would be required. The notional accident would have been brought into existence by the original certificate, and must continue to be regarded as having happened so long as may be required. The practical objection to the adoption of this view is that it is sometimes very difficult to ascertain whether or not the disease did in fact continue after the first disablement had ceased, in other words, whether the second disablement is due to a recrudescence of the first disease, or is due to a new attack of a similar nature.

It becomes necessary, therefore, to consider the authorities that were cited to us in order to ascertain which of these two views is the correct one.

The first one to be examined is that of *M'Dougall* v. *Summerlee Iron Co.* (1) In that case a workman had been certified in August, 1923, as disabled by miner's nystagmus and was duly compensated. By May, 1924, he was no longer disabled and resumed work underground. In September, 1925, he was again certified as disabled by reason of miner's nystagmus and claimed compensation as from the date of this second disablement, treating it as the date on which a second accident had happened to him. An arbitration was therefore held before the Sheriff-Substitute, the employers contending that the miner had never recovered from the first attack of nystagmus, and that the second disablement resulted from the accident that had notionally befallen him in August, 1923, in respect of which accident he had already been fully compensated. The employers were, therefore, advancing the second view of the sub-sections to which I have referred. The workman alleged, on the other hand, that he

(1) 20 B. W. C. C. 419.

had completely recovered from the first attack of nystagmus, but would appear to have alleged alternatively that, even if he had not, the second certificate was the only material certificate to be considered. In other words, he put forward alternatively the first of the two views that I have indicated. Now at the hearing of the arbitration, the Sheriff-Substitute found that after the first disablement had come to an end, some traces of the original disease still remained. Nevertheless, he made an award in favour of the workman. He said that what entitled a workman to compensation in such a case was not the presence of the disease, but the disablement arising therefrom, and that, accordingly, the second disablement was a fresh accident. This award was set aside by the First Division of the Court of Session, and the workman appealed to the House of Lords. The appeal was allowed. It is manifest from the speech of Lord Haldane that he was not prepared to entertain the possibility of miner's nystagmus continuing as a disease after the miner has left off working underground and has been put to work in a good light. When this happens, he said, the miner recovers. (1) This view, unfortunately, does not seem to be in accordance with present experience. But Lord Haldane expressly agreed with the view expressed by the Sheriff-Substitute as to the effect of the Act. "It is not unnatural," he said (2), "that the disablement and the disease should be treated as indistinguishable, and I think for the present purpose they were really indistinguishable in fact as well"—and this is the important part of the sentence—"as indistinguishable under the statute. Under the statute it is plain to my mind that what we have to deal with here is the disablement. The Sheriff-Substitute thought that, and took that view explicitly. I think he was right; but when the case gets to the Court of Session, they split the question put into two and they proceed to reason as if the disease was something different from the disablement, and as though you could construe the statute as entitling you to separate the two."

Lord Dunedin said as to the statute that he entirely

(1) 20 B. W. C. C. 423, 425.

(2) Ibid. 426.

concurred not only with the exposition that had been given by Lord Haldane, but also with what the Sheriff-Substitute had said. Lord Warrington was even more explicit. He said (1): "In the present case the arbitrator has found that the disablement resulting from the original attack of the disease had ceased. The result of that seems to me to be that the workman can no longer be treated as suffering injury by accident arising from the first attack of the disease. There then comes a fresh attack, causing fresh disablement, and a fresh certificate, and those elements together constitute a fresh injury by accident, in respect of which he is entitled to compensation. With regard to the point as to the findings of the learned arbitrator, I concur with the noble Viscount on my right in thinking that it is quite irrelevant in the present case to consider whether or not there remained traces of the disease during any part of the time in question. The material circumstance is that the disablement, which is essential to the accident, had ceased."

This appears to be an authority in favour of the first of the two views to which I have referred. It will be observed that none of the noble Lords in terms referred to the conclusiveness of the second certificate as fixing the date of the notional accident, and did not base their decision upon this. Nor, of course, was it necessary that they should, having regard to the view they took that upon the true construction of the statute each disablement constituted a new accident. In the later case, however, of *Wilsons & Clyde Coal Co.* v. *Flynn* (2), where the facts were much the same as in *M'Dougall's* case (3), it was held that a certificate of the certifying surgeon as to the date of a later disablement was conclusive as to the date of the notional accident, and that evidence was inadmissible to show that the disablement was due to an earlier notional accident created by an earlier certificate. Pausing there, I would observe that if the certificate be conclusive as to the date of the accident, it must also be conclusive as to the date of the creation of the personal injury that the accident caused. Subject, however, to this: as between different employers it is permissible under proviso (ii) to sub-s. 1 (*c*) of s. 43 to leave the realms of imagination and enter those of fact. Under that proviso an employer is entitled to show that the personal injury was occasioned before the date of the accident, with the result, if he does so successfully, that is indicated in the proviso. But as between the workman and the employer, against whom he is claiming, the personal injury—that is the disease—must be conclusively taken to have begun at the date or assumed date of the disablement fixed by the certificate.

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(1) 20 B. W. C. C. 429.
(2) [1930] A. C. 516.
(3) 20 B. W. C. C. 419.

Before leaving this question of the effect of a second certificate, it will be convenient to refer to *Meredith's* case. (1) That was a decision of this Court. The facts were as follows: A collier was certified in June, 1920, to be disabled by miner's nystagmus and was paid compensation. His disablement ceased and he returned to work underground. In November, 1921, he again obtained a certificate of disablement. This disablement ceased also in due course, and once more he returned to his work. In June, 1924, he obtained a third certificate of disablement. Each certificate stated the date of disablement as being shortly before the date of the certificate. Now in point of fact the workman had never recovered completely from the disease from which he was suffering in June, 1920, as was found by the county court judge in the arbitration proceedings that were instituted by the workman, who claimed to be compensated on the footing of the certificate of November, 1921. The workman was wrong in doing this, whichever of the two views I have mentioned be adopted. If the second view is to prevail, he should have relied upon the certificate of June, 1920. The disablement was due to the accident that had notionally happened in that month. If, on the other hand, the first view is to prevail, the disablement was due to the accident that notionally happened in June, 1924. The county court judge held as a fact that it was due to this last mentioned accident and awarded compensation on that footing. On appeal to this Court the award was upheld on the ground that the question was one of fact on which there was evidence to justify the finding. Had *Wilsons*' case (1) been decided at that time, the conclusiveness of the certificate of June, 1924, would have been a sufficient answer to the workman's claim. The Court did not, however, enter upon the question as to which of the two views that I have propounded is the correct one, and I do not think that the case affords any help in solving the question that arises upon this appeal.

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(1) 18 B. W. C. C. 251.

The next authority to which it is necessary to refer is that of *Connor* v. *Cadzow Coal Co.* (2) In that case a miner who had been certified as disabled by nystagmus was subsequently certified by the medical referee to have recovered from the disease, and to be fit for his ordinary work. The disease and the disablement had, therefore, both come to an end if the certificate meant what it said. The House of Lords, however, were doubtful as to what the medical referee really had intended to certify, and questions were directed to him to elucidate the matter. It then appeared that the referee had not intended to certify complete recovery from the disease, though there does not appear to be any doubt that he intended to certify the man's fitness for his ordinary work. That being so, the disablement had in fact come to an end, but the disease had not, and if the workman had applied for a declaration of liability, the question of which of the two views as to the construction of the statute is the correct one would have had to be decided. But so far from doing this, the workman claimed to be compensated under the provisions of s. 9, sub-s. 4, of the Act. Now it had been laid down that the words "employment of a certain kind" in that sub-section include the workman's employment at the date of the accident. That sub-section operates, therefore, even in a case where disablement has ceased in fact, and accordingly introduces, for the purpose of awarding compensation in cases in which it is applicable, a notional disablement. All that was decided in *Connor's* case (2) was that the sub-section was properly applicable to cases of industrial disease, and that as the workman's disablement notionally continued in the circumstances of that case, the workman was entitled to be compensated under the sub-section. The disease or personal injury still continued in fact, and the disablement continued notionally. The case accordingly throws no light upon the question that I am considering.

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(1) [1930] A. C. 516.

(2) [1932] A. C. 1.

The next and last case to which I desire to refer is that of *Penrikyber Navigation Colliery Co.* v. *Edwards.* (1) The facts of that case must be noted. A miner obtained from the certifying surgeon on October 17, 1920, a certificate to the effect that since that date he had been disabled by miner's nystagmus. In February, 1930, the medical referee gave a certificate in terms that were subsequently ascertained by the House of Lords to mean that the workman had completely recovered from the disease. But this disablement, that is to say, his incapacity for underground work, had never ceased, and the opinion of the medical referee was that in February, 1930, such incapacity was due to other causes than nystagmus. In March, 1930, however, the workman obtained from a certifying surgeon a certificate that he was then suffering from nystagmus and that the date of disablement was October 17, 1920. Now, apart altogether from the fact that the medical referee had certified complete recovery from the disease, this certificate was irregular or, at any rate, unnecessary, for the disablement had never come to an end. The only question was, therefore, whether the disease still continued, and this was not one to be decided by the certifying surgeon but by the respective medical advisers of the parties with a reference in case of dispute to the medical referee, for notionally the accident of October 17, 1920, had still to be regarded for compensation purposes as having happened. In view, however, that the fact of the termination of the disease had been finally determined by the medical referee, who was the proper authority for that purpose, the certificate of the surgeon was not only irregular and unnecessary, but entirely inoperative.

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(1) [1933] A. C. 28.

And this is what the House of Lords decided. The case, accordingly, throws no light upon the effect of the Act in a case where the first disablement occasioned by an industrial disease comes to an end and is thereafter followed by another, the workman never having completely recovered from the disease.

In my opinion, it is established by the authority of *M'Dougall* v. *Summerlee Iron Co.* (1) that in such a case the accident that notionally happened at the date or assumed date of the first disablement can no longer be taken into consideration. The workman must obtain a fresh certificate from the certifying surgeon, and can then recover compensation on the footing that an accident has happened to him at the date or assumed date of his second disablement. In other words, I do not think that it is competent for the certifying surgeon to date back the disablement, that is to say, the date of the notional accident, earlier than the actual date of the second disablement. But even if I am wrong as to this, I am of opinion that where the surgeon in fact certifies a date for the disablement, or omits to certify any date, the date so fixed or the date of the certificate, as the case may be, must be taken conclusively as the date of the notional accident, and, consequently, the date of the infliction of the personal injury in respect of which compensation can be sought. In such a case it is not open to the workman to assert that his personal injury was occasioned by an accident that notionally happened at an earlier date. This I take to be the effect of the decision in the case of *Wilsons & Clyde Coal Co.* v. *Flynn.* (2)

For these reasons, I am of opinion that this appeal should be allowed with the consequences that the Master of the Rolls has indicated.

Appeal allowed.

Solicitors: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham ; Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

(1) 20 B. W. C. C. 419.

(2) [1930] A. C. 516.

H. C. G.

CADBURY BROTHERS, LIMITED *v.* SINCLAIR.

1933
Jan. 17, 23.

Revenue—Income tax—Profits of trade—Deduction on account of annual value of premises—Limitation of deduction—Exception of factories from limitation—Applicability of exception to dining block connected with factory—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 5, *sub-r.* 2*—Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *Fourth Schedule.*

The Income Tax Act, 1918, Sch. D, Rules under Cases I. and II., r. 5, sub-r. 2, as amended by the Finance Act, 1926, Fourth Schedule, provides : "Where, in estimating the amount of annual profits or gains arising or accruing from any trade . . . . and chargeable to tax under this Schedule, any sum is deducted on account of the annual value of the lands, tenements, hereditaments and heritages used for the purpose of such trade . . . . , the sum so deducted shall not exceed the amount of the assessment of the lands, tenements, hereditaments and heritages for the purpose of tax under Sch. A as reduced for the purpose of collection : Provided that this provision shall not apply in the case of any premises being mills, factories or other similar premises" :—

Held, that a dining block connected and used with a factory and assessed therewith under Sch. A as one unit, is included in the term "factories" as used in the proviso to the sub-section, and, consequently, that the limitation of deduction imposed by the body of the sub-section does not apply in the case thereof.

Inland Revenue Commissioners v. *Maxse* [1919] 1 K. B. 647, principle not applied.

CASE stated by Commissioners for the Special Purposes of the Income Tax Acts.

Messrs. Cadbury Brothers, Ld., were the owners of a factory at Bournville, in the county of Warwick, which they occupied and used for the purposes of their trade, and of which the annual value assessed under the Income Tax Act, 1918, Sch. A, as one unit was 25,000*l.* About 4000 women were employed at Bournville and a block of buildings known as the dining block was erected for their use. That block contained a dining-room, kitchens, dressing and changing rooms, and other accommodation, and was connected by bridges and covered ways with the factory. In computing the deduction to be allowed to the company from its trading profits, chargeable to income tax under Sch. D of that Act, in respect of this dining block as being a hereditament used for the purpose of the company's trade, the revenue authorities had treated this block as not being a mill or factory, or similar to a mill or factory, and therefore as not being qualified for the larger deduction allowed by the proviso to r. 5, sub-r. 2, of the Rules applicable to Cases I. and II. of that Schedule. (1) In so far, however, as the gross assessment was in fact in respect of premises admitted to be mills or factories, or buildings similar thereto, figures of the annual value of such premises were agreed between the company and the inspector of taxes, and the benefit of the proviso to r. 5, sub-r. 2 (1), had to that extent been allowed.

On behalf of the company it was contended (*a*) that the block was, on the facts, part and parcel of the company's premises used for the purposes of its trade; (*b*) that, the whole of those premises having hitherto been assessed as one unit of assessment, there was no ground upon which this unit could be sub-divided; (*c*) that on the footing that the block could be separated so as to form a distinct unit of taxation, the block was within the proviso to rule 5, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D (1), and that the gross annual value was a proper deduction for purposes of computation of profits assessable under Sch. D, Case I.; and (*d*) that the assessments should be reduced accordingly.

On behalf of the inspector of taxes it was contended that

(1) *Income Tax Act*, 1918.
SCHEDULE D.
Rules applicable to Cases I. and II.

Rule 5: " (2.) Where, in estimating the amount of annual profits or gains arising or accruing from any trade, profession, employment, or vocation and chargeable to tax under this Schedule, any sum is deducted on account of the annual value of the premises used for the purpose of such trade, profession, employment, or vocation, the sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of tax under Schedule A as reduced for the purpose of collection: " Provided that this provision shall not apply in the case of any premises being mills, factories or other similar premises."

Finance Act, 1926.
FOURTH SCHEDULE.
Consequential and Minor Amendments of the Income Tax Act, 1918.

" In paragraph (2.) of the said Rule 5" of the Rules applicable to Cases I. and II. of Sch. D " the words 'lands, tenements, hereditaments and heritages' shall be substituted for the word 'premises' where it firstly and secondly occurs."

a dining block was not a mill or factory or similar to a mill or factory, even though used in the same area and by the same people; and that the proviso to r. 5, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D (1) did not, therefore, apply to it.

The Commissioners held that in computing the amount of the company's profits assessable to income tax under Sch. D, Case I., the dining block was not a mill or factory nor similar to a mill or factory, and that the proviso to r. 5, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D did not apply to it.

The company, being dissatisfied with that decision as being erroneous in law, required the Commissioners to state a case for the opinion of the High Court, and the Commissioners did so accordingly.

Latter K.C. and *Cyril King* for the company, appellants.

Sir F. Boyd Merriman S.-G. and *R. P. Hills* for the inspector of taxes, respondent.

FINLAY J. In this case the appellants own and use for the purposes of their trade a factory which has a dining block connected with it. In estimating the annual trade profits of the appellants for the purposes of income tax under the Income Tax Act, 1918, Sch. D, the question has arisen what deduction is to be allowed in respect of the dining block under r. 5, sub-r. 2, of the Rules applicable to Cases I. and II. of that Schedule. (1)

[His Lordship read the facts and the contentions of the parties as set forth in the case stated, and continued:]

The question arises, as I have said, under r. 5, sub-r. 2 (1), of the Rules mentioned, which is in these terms: [His Lordship read the sub-rule as amended by the Finance Act, 1926, and continued:] I have read the sub-rule as it has been amended by the Finance Act, 1926. That Act made certain amendments in the Income Tax Act, 1918, which it describes as minor and consequential amendments, but about some of which considerable difficulty has arisen. These amendments were, no doubt, introduced as a result of the transfer of a number of concerns from Sch. A, No. III., to Sch. D. Having regard to r. 5, sub-r. 2 (1), exclusive for the moment of the proviso, I think it is clear that the sub-rule means that the assessable unit is the thing to be looked at, and that that is the meaning of the sub-rule whether it be read as it originally appeared, or as it has been amended since 1926 by putting the expression "lands, tenements, hereditaments and heritages" instead of "premises." Coming now to the proviso, we find that it is to the effect that the limitation on the deduction imposed by the body of the sub-rule is not to apply in the case of premises being mills, factories, or other similar premises. In this case it is necessary to consider whether these last terms include such an annexed building as this dining block. Two cases were cited to me, *Norwich Union Life Insurance Society* v. *Embleton* (2) and *Largo & Lundin Links Gas Co.* v. *Smith* (3), both of which are of some assistance, but neither of which is, I think, directly in point. In the *Norwich* case (2) a block of buildings comprised a number of self-contained flats, and it was held that one assessment and one allowance for repairs should be made in respect of the building, and not a separate assessment and allowance in respect of each flat. The *Largo* case (3), which was decided before the Finance Act, 1926, had come into force, related to gasworks comprising land buildings and plant, and in assessing them to income tax under Sch. A, No. III.—the case being one in which, as Mr. Latter pointed out, there would be no assessment under Sch. A, No. I.—it was held that the deduction should be calculated by reference to such part only of the concern as consisted of factories or similar premises.

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(1) See note (1) ante, p. 390.

The argument which was addressed to me on behalf of the appellants was that one must look at the whole subject-matter as one unit of assessment, and that there was no authority for the sort of splitting-up and apportioning which the Crown desired should be made. It was contended that, if there was a separate hereditament, it should be separately assessed under Sch. A, as manifestly would be the case if a company carried on its business in two sets of premises quite distinct from each other, but that in the absence of any such separate assessment there was no room for any sub-division and the premises must be considered as a whole.

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(1) See note (1) ante, p. 390.

(2) (1927) 11 Tax Cas. 681; 137 L. T. 415.

(3) (1922) 8 Tax Cas. 296; 59 Sc. L. R. 517.

On behalf of the Crown it was argued that, although no doubt there was no express provision for the splitting-up or sub-division of the concern, yet an apportionment can, if necessary, be made without any express provision. My attention was called to a familiar case under Sch. B where it was requisite that there should be some splitting-up with reference to special provisions relating to a dwelling-house. Reference was also made, though of course only by analogy, to the excess profits duty, in the assessment of which an apportionment has been allowed; and one or two illustrative cases were cited. The case of *Inland Revenue Commissioners* v. *Maxse* (1) is probably that in which the principle of splitting-up or apportionment was carried furthest. It was also contended that in the proviso to the sub-rule one might, by analogy to cases of the sort to which I have referred, read the word " premises " as capable of meaning a part only of the assessable unit.

I prefer the argument for the appellants. If one were entitled to split up the subject-matter of assessment in the way which is suggested by the Crown, I think the greatest difficulties would arise. In every mill or factory there must be parts, which, if one isolated them and looked at them by themselves, would not constitute a mill or factory. It seems to me that the right way to read the proviso, and the way in which it must be read if it is to be practically applied, is to interpret the word " premises " in the proviso

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(1) [1919] 1 K. B. 647; 12 Tax Cas. 41. See also *Inland Revenue Commissioners* v. *Ransom (William) & Son, Ld.* [1918] 2 K. B. 709; 12 Tax Cas. 21.

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as having the same meaning as it had before the recent alteration in the sub-rule—namely, "the assessable unit." That that would have been held to be its meaning before the Act of 1926 seems to be reasonably clear. I cannot suppose that the minor and consequential alteration of the law which was made in 1926 operated so as to make any difference in the meaning of the term. If the Legislature had intended that part of the premises occupied should be differently regarded from the rest of the premises for the purposes of the proviso, I think they would have said so in express words.

On these grounds I come to the conclusion that the proviso has reference to the assessable unit itself, with the result that this appeal succeeds and is allowed.

Appeal allowed.

Solicitors for appellants: *Timbrell, Deighton & Nichols, for A. Whittaker, Bournville.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. R.

1934
Feb. 16, 19, 20.

L'ESTRANGE *v.* F. GRAUCOB, LIMITED.

Applied. CURTIS v
CHEMICAL, ETC., CO.
[1951] 1 K. B. 80

Sale of Goods—Contract in writing signed by Parties for sale of Automatic Slot Machine—Clause in small print excluding "any express or implied condition, statement, or warranty, statutory or otherwise"—No misrepresentation by Seller as to terms of Contract—Machine out of order—Action by Buyer against Seller for Breach of Implied Warranty of Fitness—Competence of Action.

The buyer of an automatic slot machine signed and handed to the sellers an order form containing in ordinary print and writing the essential terms of the contract, and in small print certain special terms one of which was "any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded." The sellers thereupon signed and handed to the buyer a printed order confirmation assenting to the terms in the order form. The machine was delivered by the sellers to the buyer, who paid to the sellers an instalment of the price. The machine did not work satisfactorily, and the buyer brought an action against the sellers in the county court claiming (inter alia) damages for breach of an implied warranty that the machine was fit for the purpose for which it was sold. The sellers pleaded (inter alia) that the contract expressly provided for the exclusion of all implied warranties. The buyer replied that at the time when she signed the order form she had not read it and knew nothing of its contents, and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract:—

Held, by the Divisional Court (Scrutton and Maugham L.JJ.), reversing on this point the judgment of the county court judge, that as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents; and that the action failed and the sellers were entitled to judgment.

Parker v. *South Eastern Ry. Co.* (1877) 2 C. P. D. 416, 421, observations approved and applied.

Wallis, Son & Wells v. *Pratt & Haynes* [1911] A. C. 394 and *Andrews Brothers (Bournemouth), Ld.* v. *Singer & Co.* [1934] 1 K. B. 17 referred to.

Richardson, Spence & Co. v. *Rowntree* [1894] A. C. 217, and the other railway ticket cases, distinguished.

APPEAL from the Carnarvonshire County Court held at Llandudno.

The plaintiff, Miss Harriet Mary L'Estrange, was the owner of premises in Great Ormes Road, Llandudno, where she resided and carried on the business of a café. The defendants, Messrs. F. Graucob, Ld., of City Road, London, E.C., were manufacturers and sellers of automatic slot machines.

On February 7, 1933, two of the defendants' representatives, a Mr. Page, their sales supervisor, and a Mr. Berse, one of their travellers, called upon the plaintiff and asked her to buy an automatic slot machine for cigarettes. A meeting was arranged at the house of the plaintiff's stepmother between these representatives of the defendants on the one part, and the plaintiff, her stepmother, and a Mr. Pratt who assisted the plaintiff in her business on the other part. The plaintiff decided to buy from the defendants an automatic cigarette machine of the description mentioned below. Mr. Page then produced a form printed on brown paper, headed "Sales Agreement," in which there were blanks for the particulars of any given transaction. The blanks on the form were then filled up with the particulars of the plaintiff's purchase and the form was signed by the plaintiff.

The document when completed was, so far as material, in the following terms: "Sales Agreement. Date Feb. 7, 1933. To F. Graucob, Ltd., ... Please forward me as soon as possible: One Six Column Junior Ilam Automatic Machine . . . . which I agree to purchase from you on the terms stated below . . . . and to pay for the same in the following manner: Instalments 8*l*. 15*s*. 0*d*. down. 18 payments of 3*l*. 19*s*. 11*d*." Then after some other formal matter came certain clauses in small print which, so far as material, were as follows: "I agree to take delivery of the machine upon receiving notice that it is ready for delivery, and to make the first monthly payment 30 days after the date following that of the posting of such notice and all subsequent payments on the corresponding date of each succeeding month. . . . If any payment shall not have been received by you within a fortnight after it has become due, all the remaining payments shall fall due for immediate payment, and I agree to pay interest on these remaining payments at the rate of ten per cent. per annum as from the date of their so falling due. In consideration of your undertaking to put in hand at once work on this machine I agree not to countermand this order. . . . This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded. . . . (sgd.) H. M. L'Estrange." Then followed printed questions relating to the purchaser and her business and premises with blank spaces for the answers which were filled in in manuscript appropriately to this case.

On the same date the plaintiff handed to Mr. Page her cheque for 4*l*. on account of the price of the machine.

On February 9, 1933, the defendants, having received the above mentioned document, sent to the plaintiff an "order confirmation" of that date signed by them; a "guarantee" for eighteen months for the free fixing, maintenance, and insurance of the machine; and an invoice.

On March 28, 1933, the machine was delivered at the plaintiff's premises, and on March 29 a mechanic of the defendants came and installed it there, the plaintiff handing to him on behalf of the defendants a further sum of 4*l.* 15*s.* in respect of the price, and 6*s.* for packing, making together 5*l.* 1*s.*

The machine did not work satisfactorily, and after a few days it became jammed and unworkable. On April 7, 1933, the plaintiff wrote to the defendants that it had failed and was still out of order, and a mechanic was sent to put it right. On April 27, she again wrote that it was far from reliable; and on April 28 a mechanic again attended to it, and the plaintiff then signed a form that it was working to her satisfaction. On May 4, she wrote that the machine had been of no use for a month, and asked for another month in which to pay her first instalment, but added that since the last overhaul the machine had worked satisfactorily. On May 8, her patience being exhausted, she wrote that she had decided to forfeit her deposit, and requested the defendants to remove the machine; and on May 11 she ceased to make use of the machine. The defendants, however, declined to terminate the transaction.

On May 25, 1933, the plaintiff brought the present action against the defendants in the county court, her claim being for 9*l.* 1*s.*, made up of the above sums of 4*l.* and 5*l.* 1*s.*, as money received by the defendants to the use of the plaintiff, having been paid by the plaintiff to the defendants as part of the consideration for the delivery of the machine pursuant to a contract in the terms of the above documents, which consideration wholly failed by reason that the machine was unfit for the purpose for which it was intended to be used.

On June 9, 1933, the defendants delivered their defence by which they denied that the machine was delivered in a condition unfit for the purpose for which it was intended; and further denied that the sum claimed by the plaintiff was payable to her: and by way of counterclaim the defendants sought to recover from the plaintiff 71*l.* 18*s.* 6*d.* as the balance of the price of the machine.

On June 19, 1933, the plaintiff delivered an amended claim which added a count for breach of an implied warranty on the sale of the machine that it was reasonably fit for the purpose for which it was sold; but which still claimed only 9*l.* 1*s.*

When the action came on for trial the plaintiff applied for and obtained leave to put her claim for 9*l.* 1*s.* in three alternative ways: (1.) repayment as on a total failure of consideration; (2.) return of money for breach of implied conditions going to the root of the contract that the machine was reasonably fit for the purposes for which it was required; and (3.) damages for breach of an implied warranty that the machine was reasonably fit for those purposes.

To these alternative claims the defendants at the trial set up the following respective defences: (1.) no total failure of consideration; (2.) no implied conditions, as the property in the machine had passed to the plaintiff, the defendants relying, as to this point, upon the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (*c*); (3.) no action on implied warranty, as the agreement signed by the plaintiff expressly provided for the exclusion of all implied warranties.

In reply to the last of these defences the plaintiff contended: (1.) that she was induced to sign the document under the impression that it was an order form; and (2.) that at the time when she signed it she knew nothing of the conditions on which the defendants relied.

Evidence was given on behalf of the plaintiff by herself and by Mr. Pratt. The plaintiff said that she did not read the brown document and that the defendants did not read it to her or tell her to read it, that she never read the words in small type and did not remember that the agents had ever called her attention to them, that she signed the document and did so intentionally, that though she signed the document she had no clear idea of what she was signing, that she thought that the document was an order form or

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a form by which she was giving her consent to the purchase of a machine, that two days after the arrival of the machine it ceased to work and that it could not afterwards be made to work continuously, and that on May 11 she ceased to use the machine and decided to ask the defendants to take it back and to forfeit her deposit. Mr. Pratt gave evidence corroborating that of the plaintiff.

Evidence was given on behalf of the defendants by Mr. Page and Mr. Berse. Mr. Page said that the interview on February 7, 1933, lasted for over two hours, that he sat near the plaintiff and read to her the whole of the brown paper document including the small print, that the plaintiff asked no question about the small print, that he pointed out to her that the total price was not stated in figures in the document, that the plaintiff signed the document at a desk while he was sitting by her, and that he also read to her the guarantee. Mr. Berse gave evidence substantially to the same effect, and stated further that the blanks in the brown document were filled up in accordance with the answers given by the plaintiff.

On August 17, 1933, the county court judge gave judgment. After stating the pleas and contentions of the parties and the substance of the evidence on both sides he went on to say that he found as a fact that when the defendants' two canvassers left the plaintiff after the interview of February 7, 1933, she had no knowledge of the contents of the document which she had signed except the amount of the purchase price and the monthly instalment and the arrangement about putting up the machine. He also found as a fact that there must have been some defect in the mechanism of the machine which rendered it so frequently unworkable that it was not reasonably fit for the purpose for which it was required. In his view there was an implied warranty that the machine should be reasonably fit for that purpose, and he found as a fact that that warranty was broken. On behalf of the defendants it was contended that that warranty was excluded by the conditions printed in small type in the conditions of sale, and reliance was placed upon the rule laid down in *Parker* v. *South Eastern Ry. Co.* (1) That rule, however, was subject to certain exceptions, and the question was whether this case came within it. The conditions here were printed in very small type, and when the issue was whether the person signing the document knew of the conditions it became material to ask whether the type was of a reasonable size. In all such cases three questions must be answered according to the directions of Lord Herschell L.C. in *Richardson, Spence & Co.* v. *Rowntree* (2)—namely: (1.) Did the plaintiff know that there was writing or printing on the document? (2.) Did she know that the writing or printing contained conditions relating to the terms of the contract? (3.) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? In the present case he (the judge) found as facts that the answer to the first of these questions was in the affirmative, and the answers to the second and third of them in the negative. On these grounds, therefore, he held that the defendants were not entitled to rely upon the clause which excluded implied warranties from the contract. He estimated the damages to which the plaintiff was entitled for breach of the implied warranty at 70*l.* He gave judgment for the plaintiff on the claim for 70*l.*; and for the defendants on the counterclaim for 71*l.* 18*s.* 6*d.*, the balance of the price.

The defendants gave notice of appeal dated September 14, 1933, from so much of the judgment of the county court judge as adjudged that the plaintiff should recover from the defendants the sum of 70*l.* damages.

A. T. Denning and *D. E. Evans* for the defendants, appellants.

Gordon Alchin for the plaintiff, respondent.

Scrutton L.J. In this case the plaintiff commenced proceedings against the defendants in the county court.

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(1) 2 C. P. D. 416, 421.

(2) [1894] A. C. 217, 219.

her claim being for 9*l.* 1*s.* as money received by the defendants to the use of the plaintiff as part of the consideration for the delivery of an automatic slot machine pursuant to a contract in writing dated February 7, 1933, which consideration was alleged to have wholly failed by reason of the fact that the machine was delivered in a condition unfit for the purpose for which it was intended. The only document which corresponds to the contract there mentioned is a long document on brown paper headed "Sales Agreement." By their defence the defendants denied that the machine was delivered in a condition unfit for the purpose intended, and denied that the sum claimed was payable to the plaintiff; and they counterclaimed for the balance of the price of the machine. Just before the trial the plaintiff amended her claim by adding a count for breach of an implied warranty that the machine was reasonably fit for the purpose for which it was sold; though she still claimed only 9*l.* 1*s.* There the pleadings stopped. At the trial, as the judge has stated in his judgment, the plaintiff's claim was put in three different ways: total failure of consideration; breach of implied conditions going to the root of the contract; and breach of warranty. The defendants pleaded: no total failure of consideration; no implied conditions; and that no action would lie for breach of implied warranty, as the agreement expressly provided for the exclusion of all implied warranties. To this last defence the plaintiff contended that she was induced to sign the contract by the misrepresentation that it was an order form, and that at the time when she signed she knew nothing of the conditions.

The county court judge has given judgment for the plaintiff for 70*l.*, though there is no claim by the plaintiff for that sum; and he has given judgment for the defendants on the counterclaim for 71*l.* 18*s.* 6*d.*, the balance of the price.

As to the defence that no action would lie for breach of implied warranty, the defendants relied upon the following clause in the contract: "This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded." A clause of that sort has been before the Courts for some time. The first reported case in which it made its appearance seems to be *Wallis, Son & Wells* v. *Pratt & Haynes* (1), where the exclusion clause mentioned only "warranty" and it was held that it did not exclude conditions. In the more recent case of *Andrews Brothers (Bournemouth), Ld.* v. *Singer & Co.* (2), where the draftsman had put into the contract of sale a clause which excluded only implied conditions, warranties and liabilities, it was held that the clause did not apply to an express term describing the article, and did not exempt the seller from liability where he delivered an article of a different description. The clause here in question would seem to have been intended to go further than any of the previous clauses and to include all terms denoting collateral stipulations, in order to avoid the result of these decisions.

The main question raised in the present case is whether that clause formed part of the contract. If it did, it clearly excluded any condition or warranty.

In the course of the argument in the county court reference was made to the railway passenger and cloak-room ticket cases, such as *Richardson, Spence & Co.* v. *Rowntree.* (3) In that case Lord Herschell L.C. laid down the law applicable to these cases and stated the three questions which should there be left to the jury. In the present case the learned judge asked himself the three questions appropriate to these cases, and in answering them has found as facts: (i.) that the plaintiff knew that there was printed material on the document which she signed, (ii.) that she did not know that the document contained conditions relating to the contract, and (iii.) that the defendants did not do what was reasonably sufficient to bring these conditions to the notice of the plaintiff.

The present case is not a ticket case, and it is distinguishable from the ticket cases. In *Parker* v. *South Eastern Ry. Co.* (4) Mellish L.J. laid down in a few sentences the law which is applicable to this case. He there said (1): "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents." Having said that, he goes on to deal with the ticket cases, where there is no signature to the contractual document, the document being simply handed by the one party to the other (1): "The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents." In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

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(1) [1911] A. C. 394.
(2) [1934] 1 K. B. 17.
(3) [1894] A. C. 217.
(4) 2 C. P. D. 416.

The plaintiff contended at the trial that she was induced by misrepresentation to sign the contract without knowing its terms, and that on that ground they are not binding upon her. The learned judge in his judgment makes no mention of that contention of the plaintiff, and he pronounces no finding as to the alleged misrepresentation. There is a further difficulty. Fraud is not mentioned in the pleadings, and I strongly object to deal with allegations of fraud where fraud is not expressly pleaded. I have read the evidence with care, and it contains no material upon which fraud could be found. The plaintiff no doubt alleged that the defendants' agent represented to her that the document which was given her to be signed was an order form, but according to the defendants' evidence no such statement was made to her by the agent. Moreover, whether the plaintiff was or was not told that the document was an order form, it was in fact an order form, and an order form is a contractual document. It may be either an acceptance or a proposal which may be accepted, but it always contains some contractual terms. There is no evidence that the plaintiff was induced to sign the contract by misrepresentation.

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(1) 2 C. P. D. 421.

In this case the plaintiff has signed a document headed "Sales Agreement," which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them.

The county court judge has given judgment for the defendants on the counterclaim for the balance of the price, 71*l*. 18*s*. 6*d*. I do not see how he could have done that unless he found that the contract included the clause in small print providing that, if any instalment of the price should not be duly paid, all the remaining instalments should fall due for immediate payment. That judgment on the counterclaim must stand. As to the claim, judgment was given for the plaintiff for 70*l*. for breach of an implied warranty, though only 9*l*. 1*s*. was claimed. Such a judgment could not have been given even in the High Court without an amendment of the claim. But even if there had been an amendment, the further difficulty would have remained that the signed document contained a clause excluding any implied condition or warranty. If the view which I have expressed as to the effect of a signed document is correct, the plaintiff has no ground of claim, and the judgment in her favour cannot stand. In my opinion, the judgment for the plaintiff on the claim should be set aside and judgment entered for the defendants on the claim; and the judgment for the defendants on the counterclaim should stand.

MAUGHAM L.J. I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations.

The material question is whether or not there was a contract in writing between the plaintiff and the defendants in the terms contained in the brown paper document. In the case of a formal contract between seller and buyer, such as a deed, there is a presumption which puts it beyond doubt that the parties intended that the document should contain the terms of their contract. The brown paper document is not a formal instrument of that character, yet, in my opinion, having been signed it may well constitute a contract in writing. A reference to any of the text-books dealing with the law of contract will provide many cases of the verbal acceptance of a written offer, in which the Courts have held that the written offer and the acceptance, even though only verbal, together constituted a contract in writing, which could not be altered by extraneous evidence. The rule may not operate equitably in all cases, but it is unquestionably binding in law.

In the present case on February 7, 1933, an order form, for such I consider the brown paper document to be, was signed by the plaintiff. It was an elaborate form containing a number of clauses, and among them certain terms and conditions in regrettably small print but quite legible. The plaintiff having signed that document gave it to a canvasser of the defendants, who took it away. It had been filled up in ink by the canvasser before she signed it. Another document called an order confirmation dated February 9, 1933, was sent to her by the defendants. In my opinion the contract was concluded not when the brown order form was signed by the plaintiff but when the order confirmation was signed by the defendants. If the document signed by the plaintiff was a part of a contract in writing, it is impossible to pick out certain clauses from it and ignore them as not binding on the plaintiff.

In a case of this nature it is possible that the document signed by a contracting party may not be the contract, but merely a memorandum in writing of a preceding verbal contract between the parties, and if in this case it appeared that the document in question was only a memorandum of a previous contract which had not contained the clause excluding all conditions and warranties, the plaintiff might have relied upon the case of *Roe* v. *Naylor* (*No.* 2) (1) and contended successfully that, as the clause was not a part of the contract, she was not bound by it. In my judgment, however, such a view as that is excluded here, because on the facts there was no preceding verbal agreement between the parties.

I deal with this case on the footing that when the order confirmation was signed by the defendants confirming the order form which had been signed by the plaintiff, there was then a signed contract in writing between the parties. If that is so, then, subject to certain contingencies, there is no doubt that it was wholly immaterial whether the plaintiff read the small print or not. There can be no dispute as to the soundness in law of the statement of Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (2), which has been read by my learned brother, to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.

There are, however, two possibilities to be kept in view. The first is that it might be proved that the document, though signed by the plaintiff, was signed in circumstances which made it not her act. That is known as the case of Non est factum. I do not think it is necessary to add anything to what Scrutton L.J. has already said about that. The written document admittedly related to the purchase of the machine by the plaintiff. Even if she was told that it was an order form, she could not be heard to say that it did not affect her because she did not know its contents.

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(1) (1919) 87 L. J. (K. B.) 958. (2) 2 C. P. D. 416, 421.

Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation. She contended that she was so induced to sign the document inasmuch as (i.) she was assured that it was an order form, (ii.) that at the time when she signed it she knew nothing of the conditions which it contained. The second of these contentions is unavailing by reason of the fact that the document was in writing signed by the plaintiff. As to the first contention it is true that the document was an order form. But further, if the statement that it was an order form could be treated as a representation that it contained no clause expressly excluding all conditions and warranties, the answer would be that there is no evidence to prove that that statement was made by or on behalf of the defendants.

In this case it is, in my view, an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms. I may add, however, that I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print. I also think that the order confirmation form should have contained an express statement to the effect that it was exclusive of all conditions and warranties.

I agree that the appeal should be allowed.

Appeal allowed. Judgment entered for defendants on claim as well as on counterclaim.

Solicitor for defendants, appellants: *Herbert A. Phillips.*

Solicitors for plaintiff, respondent: *Theo. Goddard & Co., for Chamberlain, Johnson & Parke, Llandudno.*

J. R.

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THE KING *v.* WILLIAM LITTLEBOY.

Criminal Law—Summing-up—Defence of Alibi—Non-disclosure by accused in police court—Comment by trial judge—Propriety.

The appellant was charged with an offence against a girl above the age of thirteen and under the age of sixteen years. When formally charged in the police court and when asked before being committed for trial if he desired to give evidence on his own behalf or to call witnesses, he said: "I am not guilty. I reserve my defence." At the trial at the Assizes, he adduced evidence that, at the material time, he was away from the place where the offence was alleged to have been committed. The trial judge commented on the failure of the accused to disclose his defence in the police court and said to the jury that it was unfortunate that the accused did not then and there state where he was at the material time, so as to afford the prosecution an opportunity of making their own inquiries to test the truth of the statement:—

Held, that the comment did not constitute misdirection. Observations on the failure to disclose a defence at some date earlier than the trial should be made with care and with fairness to the accused person in all the circumstances of the case, but there was no general proposition of law that in no circumstances could comment be made on the failure to disclose the defence in the police court.

Per Lord Hewart C.J.: There is a great difference between making the comment that silence on the part of the prisoner is unfortunate and a matter to be regarded with reference to the weight of the defence, when the defence of alibi is raised, and saying that the fact that the prisoner was silent may be treated as evidence against him or as corroborating the evidence of an accomplice.

Rex v. *Naylor* [1933] 1 K. B. 685 distinguished.

Appeal against conviction.

The appellant, William Littleboy, was convicted at Norfolk Assizes on May 31, 1934, of carnal knowledge of a girl above the age of thirteen and under the age of sixteen years, and was sentenced to twelve months' imprisonment in the second division.

The appellant was fifty-nine years of age and was the uncle of a girl named Ruby Dorothy Ward, who on April 4, 1934, gave birth to a child. The girl stated that the appellant was the father and that he had had connection with her on three occasions—namely, twice in May, 1933, and once in particular on June 29, 1933. With regard to the offences alleged to have taken place in May, 1933, there was no corroboration of the girl's story, but with regard to the offence alleged to have been committed on June 29, 1933, there was corroboration in the evidence of a girl named Molly Dugdale, who said that she had been in the motor-car with the appellant and Ruby Dorothy Ward and that they had stopped at the appellant's house, and that Ruby Dorothy Ward and the appellant had gone into the house and were in there for a quarter of an hour. The appellant denied the alleged offences entirely and set up an alibi so far as June 29, 1933, was concerned. He gave evidence at the trial that he was at Wroxham on June 29, 1933, from about 3 o'clock until 6.30 p.m., and that he then went to Yarmouth with his wife. He denied that he was at his house at Norwich with the girl on that day. The defence of alibi was supported by the evidence of the appellant himself, his wife and two other witnesses, who said that on the day in question the appellant was at Wroxham, which was some distance from his house in Norwich, at the time when, according to the case for the prosecution, the offence was committed. Evidence was given by a detective officer that, when the appellant was spoken to about the alleged offences, he said that he knew nothing about them and did not commit them, and that he did not remember bringing Ruby Dorothy Ward or any other girl in his motor-car to his house; that when told he would probably be charged, he said that he did not know what to say to that; and that when the summons relating to the charge was read over to him, after he was cautioned, he said: "Is this a summons for maintenance?" At the hearing before the magistrates the appellant was represented by a solicitor. When formally charged at that hearing the appellant said: "I am not guilty. I reserve my defence."

The appellant was tried at the Norfolk Assizes before Avory J. In the course of his summing-up to the jury the learned judge referred to the defence of alibi, and observed that it was unfortunate that the prisoner did not say then and there—that is to say, when charged and when asked by the magistrates before being committed for trial if he desired to give evidence on his own behalf or to call witnesses

—that he was at Wroxham on June 29. The learned judge proceeded to say: "If he says it then and there, it gives the police, or those who are conducting the prosecution, an opportunity of making their own inquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time, on June 29. By adopting the course of saying 'I reserve my defence,' of course, he deprives the prosecution of any opportunity of testing that statement."

Linton Thorp K.C. and *Gerald Dodson* for the appellant. The learned judge, in his summing-up to the jury, commented adversely on the fact that the appellant, when charged before the magistrates, did not say that he was at Wroxham, at the material time, on June 29, 1933. The learned judge's comment conflicted with the decision of the Court in *Rex* v. *Naylor*. (1) See also Criminal Justice Act, 1925, s. 12. In *Rex* v. *Parker* (2) a similar comment was held to be proper, owing to the special circumstances of that case. In that case there were three accused persons, two of whom had disclosed their defences at the hearing before the magistrates, while the third had not. *Rex* v. *Naylor* (1) was distinguished on that ground. In this case there was a misdirection, as there was a comment in the summing-up on the failure of the appellant to disclose the defence of alibi when before the magistrates. Certain questions on the same matter were put by the judge to the appellant at the close of his cross-examination. Further, it is submitted that in this case the comment was not warranted in fact, because notice of additional evidence was served on the appellant and that additional evidence was of such a nature as to show that the police knew that the defence of alibi with regard to June 29 was going to be raised and had taken steps to rebut it.

Gerald Howard for the Crown. The proposition that in no circumstances may a judge comment on the failure of an accused person to disclose his defence at an earlier date is too wide. The question is whether the comment which was made by the learned judge is to be regarded as improper.

(1) [1933] 1 K. B. 685.

(2) [1933] 1 K. B. 850.

In *Rex* v. *Naylor* (1) the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. In *Rex* v. *Parker* (2) the comment was similar in its language to the comment in the present case and went further than was necessary if the only object of the comment was to distinguish between the cases of the three accused persons. In the present case, the additional evidence was obtained not with the object of rebutting the defence of alibi but to strengthen the evidence for the prosecution, if necessary.

Linton Thorp K.C. replied.

The judgment of the Court (LORD HEWART C.J., SWIFT and DU PARCQ JJ.) was delivered by

LORD HEWART C.J. [who stated the facts and said :] The summing-up, which was a very careful one, contained a passage on which great stress has been laid on behalf of the appellant. Having referred to the defence of alibi, Avory J. observed that it was unfortunate that the prisoner did not say then and there—that is to say, when charged and when asked by the magistrates before being committed for trial if he desired to give evidence on his own behalf or to call witnesses—that he was at Wroxham on June 29. The learned judge proceeded to say : " If he says it then and there, it gives the police, or those who are conducting the prosecution, an opportunity of making their own inquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time, on June 29. By adopting the course of saying 'I reserve my defence,' of course, he deprives the prosecution of any opportunity of testing that statement." In other words, the fact that that statement was not made before the magistrates was not treated as evidence against the appellant, but was used by way of observation on the defence of alibi which was set up at the trial. Mr. Linton Thorp contends that that was misdirection, as there was a comment in the summing-up on the failure

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(1) [1933] 1 K. B. 685.

(2) [1933] 1 K. B. 850.

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to disclose the defence of alibi at an earlier stage. Reference was also made to questions put by the judge to the appellant at the close of his cross-examination. The judge asked him the following questions: "(Q.) When you were asked after all the evidence had been given if you had anything to say in answer to the charge, why did not you then say to the magistrates that you were at Wroxham on June 29 and could prove it? (A.) Well, I believe I heard my solicitor say that he could prove where the defendant was on June 29. (Q.) Never mind what your solicitor said. I am asking why you did not say it when you were asked what you had to say in answer to the charge? (A.) Well, when I was asked if I had anything to say in answer to the charge, I simply said I was not guilty and I reserved my defence."

A further point was taken on behalf of the appellant—that notice of additional evidence was served and that that additional evidence was of such a nature as to show that the police were aware that the defence of alibi was going to be raised and had taken steps to meet it. That additional evidence, which was not adduced at the trial, is before the Court and we have carefully considered it. It is not by any means necessarily to be regarded as evidence to rebut an alibi; it may at least equally well have been evidence to support the testimony given on the part of the prosecution. Mr. Howard has told us that the evidence was not obtained for the purpose of rebutting an alibi and that it was not offered, because it was not thought to be necessary. The matter is perhaps a little unsatisfactory, but, after careful consideration, we do not think that there is any real substance in this point.

The real point urged on behalf of the appellant is that the judge was wrong in making observations on the fact that the defence of alibi had not been disclosed before the magistrates, and our attention has been directed to *Rex* v. *Naylor*. (1) It is important to remember that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. The judgment of this Court in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay down the proposition that a judge may not, in a proper case, comment on the fact that the defence of alibi has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an alibi, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested ; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice.

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(1) [1933] 1 K. B. 685.

It is apparent that in *Rex* v. *Naylor* (1) the attention of the Court was directed to *Rex* v. *Moran* (2), where the headnote, going a little beyond what was said in the judgment, is as follows : "The defence of an alibi ought to be set up at the earliest possible moment, and ought to include a statement where the defendant was at the time charged." The following observation by Lord Alverstone C.J. occurs (3) : "He" [the applicant] "had, at the police court, a full opportunity of saying where he was. It is very unfortunate that he kept back this alibi until the trial." In that case there was an application to call a witness on the appeal to prove an alibi and that application was refused, the Court saying that it was impossible to reopen the case.

We are not seeking to lay down, nor would it be useful to lay down, any general proposition either with regard to the defence of alibi or with regard to the disclosure of defences. The question which we have to determine is a much more limited one—whether it is a misdirection for a judge to say that failure to disclose an alibi in time to afford an opportunity of its being tested is unfortunate and something to be borne in mind with reference to the value of the defence. The

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(1) [1933] 1 K. B. 685.

(2) (1909) 3 Cr. App. R. 25.

(3) Ibid. 26.

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judge in the present case, having made the observations to which I have referred, went on to say: "It is only if you are satisfied by the evidence looked at as a whole that this offence is brought home to the defendant, and you are satisfied that there is in this case some corroboration of the girl's story, that you are justified in convicting: if you are not satisfied of that and entertain any reasonable doubt about it, your duty is to acquit him."

We have very carefully considered the whole matter and the various cases to which our attention has been directed and we do not think that what was said in the summing-up amounted to a misdirection. No doubt observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case, but we do not assent to the general proposition that in no circumstances may comment be made on the failure to disclose the defence in the police court. The observations of the Court in *Rex* v. *Naylor* (1) were never intended to go that length. There is a great difference between making the comment that silence on the part of the prisoner is unfortunate and a matter to be regarded with reference to the weight of the defence, when the defence of alibi is raised, and saying that the fact that the prisoner was silent may be treated as evidence against him or as corroborating the evidence of an accomplice.

Looking at the summing-up, we are not prepared to say that there was any misdirection on the part of the judge. The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Daynes, Keefe & Durrant, Norwich.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1933] 1 K. B. 685.

T. W. M.

C. A.

1934

June 21, 22, 25; *July* 9.

In re AUDIT (LOCAL AUTHORITIES) ACT, 1927, AND *In re* A DECISION OF H. W. MAGRATH.

Local Government—County accounts—Audit—Retrospective additional payment to official—Surcharge—Relief.

In view of the increased duties imposed in consequence of the Finance Act, 1920, and the Roads Act, 1920, upon local authorities in the levying and collection of Road Fund licences as from January 1, 1921, the Minister of Transport, in 1920, issued a circular to local authorities that he would be prepared to give the fullest consideration to any representation made to him as to increasing the salaries of their officers. Nothing was then done by the Durham County Council in the matter, but in 1925 that council resolved that their County Accountant, upon whom the new duties had been imposed, should be paid an additional sum of 100*l.* per annum as from February 1, 1925. Nothing was then said with regard to the preceding years—1921 to 1925—during which the same duties had been performed. In 1931 the county council adopted a report of their committee recommending that as 1575*l.* had been received from the Minister for the supervision and control of the department by the County Accountant, and as 600*l.* only had so far been granted to that officer, he should be paid the sum of 700*l.* out of the money so received, and accordingly that amount was paid to him. That payment was disallowed by the District Auditor and the councillors who had voted for the recommendation were surcharged. On appeal from that decision it was sought by affidavits of members of the county council to show that the increase of salary granted to the County Accountant in 1925 was provisional only and that in respect of the period 1921–1925 the matter of his remuneration was still open to review.

Held, (1.) that there being nothing in the records of the county council to show that the grant of additional salary made in 1925 was provisional only, it was not open to the council to make the further payment in 1931 in respect of the years 1921–1925, and therefore that the Auditor was right in disallowing it as being retrospective and made without consideration; but (2.) that in the circumstances relief from the surcharge should be granted.

Held, further, that certain ratepayers who had appeared, as they were entitled to do under s. 247, sub-s. 6, of the Public Health Act, 1875, before the Auditor in support of their objection to the payment, were entitled, by implication, to appear on the hearing of the appeal to protect the disallowance they had obtained.

Per Maugham L.J. Such a body as a county council necessarily acts by the resolution of a majority of the members then present, and evidence is not admissible to show that some of the members present and voting took a particular view of the resolution which they concurred in passing.

Decision of Divisional Court reversed in part.

AUDIT (LOCAL AUTHORITIES) ACT, 1927, AND A DECISION OF H. W. MAGRATH, *In re.*

APPEAL from a decision of a Divisional Court.

The facts giving rise to the question are fully set out in the judgments; shortly stated they were these: Certain duties having been statutorily imposed upon local authorities with reference to the levying and collection of Road Fund licences, the Minister of Transport, by a circular issued in 1920, said (inter alia): "Where local authorities consider that the increased duties and responsibilities thrown upon their officers require some addition to their salaries, the Minister will be prepared to give the fullest consideration to any representation" on the subject. In the county of Durham the supervising staff of the county council was the County Accountant, with respect to whom there came before the Council, in 1925, a resolution of the Local Taxation Licences Committee "that the Salaries and Finance Committees be recommended to increase the County Accountant's salary by 100*l.* per annum as and from February 1, 1925," and the resolution added: "The Ministry of Transport has since the coming into operation of the Roads Act, 1920, paid into the county fund the sum of 600*l.* in respect of the County Accountant's supervision of the department and the County Accountant has up to the present received no extra remuneration for the additional work cast upon him." That resolution was approved and from that time onward the County Accountant received an addition of 100*l.* per annum to his salary, but nothing was then done with regard to the years 1921 onward which had then elapsed. In July, 1931, however, the county council adopted a report of their Committee whereby it was recommended that 1575*l.* having been received from the Minister for the supervision and control of the department by the County Accountant, and 600*l.* only had so far been granted to him, the council should pay him the sum of 700*l.* out of the money so received from the Minister, and accordingly that sum, less a deduction for superannuation allowance, was paid to him. This payment was disallowed by the Auditor on the following grounds: (1.) that it was remuneration for work done for a number of years before 1931 and as such was a retrospective payment and had no force in law; (2.) that it was not authorized by statute or other competent authority and was not a legal charge upon the county funds; (3.) that it was an expenditure unreasonably and unnecessarily incurred; (4.) that the County Accountant was already adequately remunerated. The Auditor accordingly disallowed the payment and surcharged those members of the council who supported the resolution under which it was paid.

Those thus surcharged appealed.

The Divisional Court (Lord Hewart C.J., Avory and Charles JJ.) held that in the circumstances the payment to the County Accountant was reasonable; that the decision of 1925 did not conclude the matter and that it was still open to the council in 1931 to pay in a lump sum the amount of the annual sums they might have paid during the preceding years in respect of the supervision work done by the County Accountant. Accordingly the appeal was allowed and the surcharge quashed.

The Auditor appealed.

Croom-Johnson K.C. and *Erskine Simes* for the Auditor. The surcharge was right as the payment in question was made without consideration. The resolution of 1925 whereby as from that year the County Accountant's salary was increased by 100*l.* was not a mere provisional resolution, and evidence is not now admissible from those taking part in the discussion which resulted in that resolution to contradict its terms and show that the matter of the County Accountant's salary was still open to review. The fact that the resolution might have dealt with the remuneration of the officer for the years 1921–1925 will not avail the council: see *Reg.* v. *Ramsgate Corporation.* (1) As was pointed out in *Roberts* v. *Hopwood* (2): "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable

(1) (1889) 23 Q. B. D. 66, 70.
(2) [1925] A. C. 578, 595.

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care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others," and again (1): "The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them." Here it is clear that for the payment of the sum of 700*l.* to the County Accountant there was no fresh consideration, seeing that the services had been rendered in the past.

Mallalieu for certain ratepayers who had appeared before the Auditor asked to be heard.

Morley K.C. for the councillors surcharged. Although ratepayers are entitled to be present at the audit—see s. 247, sub-s. 6, of the Public Health Act, 1875—there is no provision enabling them to take part in an appeal from the auditor's decision.

[Scrutton L.J. We propose to hear Mr. Mallalieu de bene esse and will afterwards deal with the point.]

Mallalieu supported the appeal by the Auditor.

Morley K.C. and *Denis H. Robson* for the councillors. The objection taken to the payment of the 700*l.* is merely technical, to which effect should not be given. The Auditor has not cavilled at the amount, but to it having been paid in a lump sum instead of in the various years during which the work was done. The payment cannot be illegal merely for that reason. In *Edwards* v. *Salmon* (2), where a payment was made to the clerk of a local authority in respect of extra services rendered in connection with the carrying out of a sewage scheme, it was held that he was not liable to a penalty under s. 193 of the Public Health Act, 1875, for accepting a fee or reward other than his proper salary, wages and allowances. Lord Halsbury there expressed the opinion that the word "allowances" in the section included "extra payment for extra work" made ex post facto. In *Roberts* v.

(1) [1925] A. C. 604.

(2) (1889) 23 Q. B. D. 531.

Hopwood (1) Lord Buckmaster said that "the general rule applicable is that the council shall pay such wages as they may think fit, the discretion as to the reasonable nature of the wages being with them." In the same case Lord Atkinson said (2): that "acts done in flagrant violation" of their duty should be properly held to have been done contrary to law. Similarly Lord Wrenbury (3) spoke of the council whose acts were there in question as having made "payments far in excess of those necessary to obtain the services required." Those dicta show the wide distinction between that case and the present. Here there has been no flagrant violation of the council's duty or a payment far in excess, or in excess at all, of the services rendered; it was reasonable and lawful; indeed it may be considered a payment by the Minister of Transport through the county council.

Knight's Case (4) and *In re Fireproof Doors, Ld.* (5), were also cited.

Erskine Simes replied.

Cur. adv. vult.

July 9. The following judgments were read :—

SCRUTTON L.J. In auditing the accounts of the Durham county council for the year ending March 31, 1932, the District Auditor disallowed a sum of 700*l.* in the item "Salaries of County Officers," paid to Mr. Bottomley, the County Accountant, under a resolution of the council, dated July 29, 1931, as being contrary to law and unreasonable on various grounds stated in the certificate; he also surcharged the sum of 700*l.* on various members of the council named in the certificate. They brought the matter before a Divisional Court of the King's Bench Division appealing against the disallowance, and asking for a declaration, amongst other things, that they be relieved from personal liability in respect of the surcharge. The Court (the Lord Chief Justice, Avory J., hesitating, but concurring, and Charles J.) allowed

(1) (1925] A. C. 578, 588.
(2) Ibid. 596.
(3) [1925] A. C. 614.
(4) (1867) L. R. 2 Ch. 321.
(5) [1916] 2 Ch. 142.

the appeal, quashed the disallowance and, rather unnecessarily, as it appears to me, granted the declaration asked for. The District Auditor now appeals to this Court, asking that the original disallowance and surcharge be confirmed.

The facts are as follows: by s. 13 of the Finance Act, 1920, a duty was imposed on licences for mechanically propelled vehicles, and by the Roads Act, 1920, county councils were required to levy these and other duties on carriages and to pay them into the Road Fund established by s. 3 of that Act. Sect. 3, sub-s. 4, required the Minister of Transport to pay out of the Road Fund to every county council by whom the duties were levied an amount equal to the expenses properly incurred by that council. Before the Roads Act was passed the Minister of Transport, in order to be ready to provide the county council with funds to carry out their duties, issued a circular asking for an estimate of the probable expense to be incurred by them. One of the headings in the form to be filled in was "(A) Supervising Staff." Under this head there was appended the following note: "The Minister anticipates that, in many cases, it will not be necessary (especially with the larger authorities) to make an apportionment of existing salaries of chief administrative officers upon whom any new or extended duties may devolve in connection with registration and licensing. Where, however, local authorities consider that the increased duties and responsibilities thrown upon such officers require some addition to be made to their salaries, the Minister will be prepared to give the fullest consideration to any representations in this sense. He recognizes that in some cases an adjustment of an existing administrative officer's salary may secure more efficient administration than would the appointment of a new officer at a lower salary." This note apparently contemplates three states of things as possible: (1.) that with the larger authorities it may not be necessary to increase the salaries of whole-time officers because a new Act throws additional duties on them. The judges do not get increased salaries because new legislation like the Rent Restriction Act or the Agricultural Holdings Act gives them a great deal of extra work. I think the circular, however, contemplates that the existing salaries, though not increased, may be "apportioned," and a part of them representing the new work may be claimed from the Road Fund; (2.) that it may be necessary to increase the salary of existing officers and claim the increase from the Road Fund; (3.) that it may be necessary to appoint new officers and claim their salaries. Durham County Council had in 1920 a County Accountant, Mr. Bottomley, a whole-time officer, at a salary of 1700*l.* a year. They sent in to the Minister of Transport estimates of expenditure quarterly, filling in for the supervising staff 50*l.* a quarter up to April–June, 1922, when they reduced the figure to 37*l.* 10*s.* a quarter, at which it remained until February, 1925, when the council passed the first resolution to be referred to. The change from 50*l.* to 37*l.* 10*s.* is referred to in a letter from Mr. Bottomley to the Minister of Transport, dated February 2, 1922, in these terms: "With regard to the 50*l.* per quarter for supervision, this was a general credit to the County Fund and is for supervision by myself and deputy. This is a figure that I think might be reduced, and I shall be glad of some advice of what is done in some other counties." Besides the estimates of expenditure, a yearly return of actual expenditure was also made by the county council, and until 1925 this included at first 200*l.* and then 150*l.* a year for the supervising staff. These amounts were paid by the Minister of Transport to the county council, and by them paid into the County Fund. No part of these payments was set aside to a reserve fund or suspense fund or earmarked as due to the County Accountant or his deputy. In spite of these estimates and claims for actual expenditure, no increase was made in the salary of the County Accountant. The proceedings of the county council so far can only be justified if they are treated as "apportioning" a part of the existing salary to the expenses of supervising the collection of the duties on licences. In the early estimates and accounts of actual expenditure a sum of 40*l.* a quarter was estimated and claimed for "Expenses of audit by County Accountant's staff." This disappears in 1921; it is referred to in Mr. Bottomley's letter of February 2, 1922, but no further evidence was given to explain it.

In February, 1925, the matter of Mr. Bottomley's remuneration was brought before the county council. Neither Mr. Bottomley's affidavit nor the affidavit of those representing the councillors surcharged, nor any minutes, represent that it had been mentioned or discussed before. It came before the council, because the Local Taxation Licences Committee had asked the Salaries and Finance Committees to consider and recommend an increase of the County Accountant's salary by 100*l.* per annum as from January 1, 1925, and the Salaries Committee had reported to the Finance Committee agreeing this. This appears in document 10 in this way: " We have considered and approved the following report of the Salaries Committee "—this is the Finance Committee's report—" We have considered and agreed to the following resolution passed by the Local Taxation Licences Committee, namely, 'That the Salaries and Finance Committees be recommended to increase the County Accountant's salary by 100*l.* per annum as and from the 1st instant. The Ministry of Transport have, since the coming into operation of the Roads Act, 1920, paid into the County Fund the sum of 600*l.* in respect of the County Accountant's supervision of the department, and the County Accountant has up to the present received no extra remuneration for the additional work cast upon him '." The Finance Committee also agreed and reported to the council, which approved their report on February 2, 1925. The last part of the report appears to allege the reason for the recommendation. In pursuance of this resolution Mr. Bottomley was paid a salary of 1800*l.* a year from January 1, 1925. The council continued to " estimate " and claim from the Minister of Transport as " actual expenditure " 150*l.* a year for supervising staff, but only paid 100*l.* a year extra to Mr. Bottomley. The balance of 50*l.* a year was paid into the County Fund, and no suspense or reserve fund or earmarking in favour of Mr. Bottomley was constituted. There is no record in the minutes of any further discussion of the position in committees.

Mr. Bottomley's affidavit says in paras. 5 and 6: "At the time the resolution of February 4, 1925, granting me 100*l.* a year was passed I had conversations with representatives of the party then in power and from those conversations I understood that the matter of my said salary was not finally disposed of and that I was to be entitled to raise the matter again at a later date. (6.) The party then in power was defeated at the polls in March, 1925, and Mr. Peter Lee became chairman of the Finance Committee. I frequently spoke to him about my said salary, and again I understood that the matter was not finally disposed of but owing to industrial unrest it was shelved and not taken up again immediately." Mr. Lee, chairman of the Finance Committee, says in his affidavit in paras. 8 and 9, after mentioning the resolution of 1925: "The County Accountant's salary was therefore increased as from January 1, 1925, by 100*l.* per annum, but this was not understood by us these deponents" —there are two other deponents to the affidavit—"or by the County Accountant to be a final settlement of the matter. I, Peter Lee, for myself say that since I became chairman of the Finance Committee in the year 1925 the County Accountant has frequently spoken to me about his salary with regard to the said work concerning the taxation of mechanically-propelled motor vehicles. The matter although open to further consideration was not dealt with again after the resolution of February 4, 1925, had been passed on account of the industrial unrest in the years that followed. The matter was not laid before the county council for their consideration again until the year 1931 although it had in the meantime been discussed in committee." There is no minute supporting the latter statement.

The next relevant matter is the resolution of the council on July 29, 1931, relied on as authorizing the payment of 700*l.* disallowed by the District Auditor. This came before the council on a reference of the Finance Committee to the Salaries Committee, who reported to the council as follows in s. 12 of their report: "We have had under consideration the following matter which was referred to us by the Finance

Committee: (*a*) The question of the difference between the sums received from the Minister of Transport for the services of the County Accountant, and the amount paid to him out of such sums, as it appears to us undesirable that an exception should be made in the case of this officer and that the county council should make a profit out of the arrangement made with the Minister. (*b*) The out-of-pocket expenses of the County Accountant during the last seven years. The total sum received from the Minister of Transport under the arrangement for the supervision and control of the Local Taxation Department by the County Accountant, now amounts to 1575*l.*, but of this sum only 600*l.* has been granted to the County Accountant. We recommend the county council to pay to the County Accountant the sum of 700*l.* out of the moneys received from the Minister of Transport in respect of his services in the supervision of the Local Taxation Department. and that in future all moneys paid by the Minister in respect of the services of the accountant be paid to the accountant."

It will be noticed that the council retained 275*l.* of the amount they had received from the Road Fund and that they did not purport to increase the salary of Mr. Bottomley, nor did they specify in respect of what period, if any, they were making this payment to him. Mr. Bottomley says he was paid the sum of 700*l.* "in respect of my services in the supervision of the said department," without specifying for what period he was paid. Mr. Lee says in para. 11 of his affidavit: "The said sum was remuneration for work done prior to March 31, 1931, but was paid out of moneys specifically allocated for such remuneration and as such was a delayed payment and was not retrospective and was a payment of moneys to which he was at all times entitled." The latter contention was abandoned before us by counsel for those surcharged who, however, stated to us, as I understood him, that it was remuneration either (1.) for services in the years 1921 to 1924 inclusive, for which he had been paid nothing, or (2.) that it was made up of 150*l.* a year received from the Government before 1925 and 50*l.* a year received from the Government since 1925 and not paid to Mr. Bottomley. I think he preferred the former view, having regard to the language of the resolution of 1925. The Divisional Court appear to have taken the view that the resolution of 1925 was only provisional and left over the final adjustment until a later occasion. The Lord Chief Justice says : " In my opinion it is reasonably clear upon the materials which are before the Court that this resolution giving him another 100*l.* a year in 1925 was not intended to deal exhaustively with the matter . . . . The final adjustment was left for a future occasion. It is not suggested that the County Accountant might have commenced an action to recover the sum of 700*l.* as money had and received to his use. The argument is that in all the circumstances this payment was reasonable. In our opinion that argument is sound. . . . Upon a fair view of these affidavits the decision of 1925 did not conclude the matter." Avory J. concurs with some hesitation, as he thinks there was material on which the Auditor might have regarded the payment as made ex gratia. He thinks there is just sufficient evidence that after 1925 the question of further remuneration to be paid to the County Accountant for extra services rendered was left in abeyance and for future consideration. He says : " I think there is just sufficient evidence." Charles J. says : " The evidence is not perhaps as satisfactory as it might be but is quite sufficient to impel us to come to the conclusion that the resolution of 1925 was not a determinate resolution but the matter of the alteration of the amount of the salary was left open." I am not able to take the view of the evidence taken by the Divisional Court. From 1921 to 1925 the council took no step to increase the remuneration of 1700*l.* a year paid to Mr. Bottomley. When in 1925 they did consider the matter, they gave him extra remuneration by increasing his salary after January 1, 1925, to 1800*l.* a year. The records of the council or its committees contain nothing to show that this determination was provisional and that the period from 1921 to 1931 was still open to review. I cannot think that in 1931 it was open to the council to resolve that they had not paid Mr. Bottomley sufficient for a period beginning in 1921 or for a period after January 1, 1925, in respect of which they had already passed a resolution fixing his remuneration, and to resolve that they would then pay him some further sum making his remuneration in the year 1931 over 2500*l.* It is not as if they had waited until a period when the work was concluded to fix the remuneration, as in *Edwards* v. *Salmon.* (1) I cannot think that the matters mentioned by Mr. Bottomley, unrecorded conversations with "representatives of the parties in power," understood by him to mean that the matter of his remuneration for past services was still open, or the matters mentioned by Mr. Lee that he did not understand that the matter of past remuneration was finally settled, can control or interpret the clear language of the resolution. It appears to me that to allow representative bodies, years after the remuneration of their officers has been clearly fixed, to make further payments in respect of past years because they thought that their predecessors had not paid enough, would be most prejudicial to the working of local government and unreasonable in the highest degree.

By s. 247, sub-s. 7, of the Public Health Act, 1875, the duty of the Auditor is to disallow every item of account "contrary to law." The decision in *Roberts* v. *Hopwood* (2) shows that a payment unreasonable in amount, or based upon circumstances which it is unreasonable to consider, is "contrary to law" and may be disallowed. I do not think there was any difference in principle between my judgment and that of the noble Lords. I still remain of the opinion as to principles which I expressed in that case. I, like Lord Buckmaster, endeavoured to follow the principle laid down by Lord Russell in *Kruse* v. *Johnson* (3) that the Courts should be very reluctant to interfere with the discretion conferred by statute on a representative body. The noble Lords thought I had misjudged the point at which the Court should so interfere. I am of opinion in the present case that the action of the Durham county council in voting remuneration

(1) 23 Q. B. D. 531.

(2) [1925] A. C. 578.

(3) [1898] 2 Q. B. 91.

in 1931 for work already provided for by resolution covering the period from 1921 to 1931 is unreasonable and contrary to law. I am therefore of opinion that the decision of the Divisional Court quashing the disallowance by the District Auditor of the payment of 700*l.* to Mr. Bottomley should be reversed and the disallowance reinstated.

On the question of surcharge the matter is difficult. If surcharges are to be effective as deterrents for the future, they should be enforced, but if my memory serves me, the Minister remitted the surcharges which the House of Lords approved in *Roberts* v. *Hopwood.* (1) The Audit (Local Authorities) Act, 1927, by s. 2, sub-s. 2, allows a person surcharged to appeal to the Court for a declaration that in the matter of the surcharge he acted (1.) reasonably, or (2.) in the belief that his action was authorized by law, and the Court may make such an order, if satisfied there is proper ground for doing so, and may relieve such person wholly or partly from personal liability in respect of the surcharge. The District Auditor does not deny that the persons surcharged were acting in the belief that their action was authorized by law, but says very reasonably that unless they are surcharged, the only effect will be to throw on the ratepayers an unreasonable payment contrary to law. I think there may be another effect of the decision, to establish that this kind of retrospective ex gratia payment is contrary to law and possibly to make for better government in the future. Having regard to the occupations of the persons surcharged, as shown in the affidavit, I should be reluctant if they have honest belief in the legality of the action they sanctioned, to require too high a standard of knowledge of law from them. I should therefore not interfere with the declaration of the Divisional Court on the point, which now becomes necessary, except by deleting the words "reasonably and." I should allow this appeal to the extent of restoring the Auditor's disallowance and order the Durham County Council to pay the taxed costs here and below of the District Auditor. The members surcharged should not have any costs of this appeal.

(1) [1925] A. C. 578.

A curious but incidental question arises as to the position of certain independent ratepayers of Durham County. As authorized by s. 247, sub-s. 6, of the Public Health Act, they appeared before the District Auditor to object to that item in the accounts. The Auditor allowed their objection. The persons surcharged appealed to the Court against the disallowance and it was objected that the ratepayers had no right to appear to support the disallowance they had procured. I do not find any express words giving them that right, but I am of opinion that being expressly allowed to appear to obtain a disallowance, it must be implied that they may appear on the appeal to protect the disallowance they have obtained. They neither receive nor pay costs.

GREER L.J. On July 29, 1931, Durham County Council recommended a payment to the County Accountant of the sum of 700*l.* out of moneys received from the Ministry of Transport in respect of his services in the supervision of the local taxation department, and thereafter paid the said sum to the County Accountant. The said payment appeared in the General County Revenue Account for the year ending March 31, 1932, and the County Auditor in pursuance of his statutory powers, and, as he conceived, in pursuance of his duty as Auditor, disallowed the said sum, holding that it was an illegal payment, and surcharged the same on the members of the council who had supported the resolution approving the payment. The members so surcharged appealed to the Divisional Court, and on January 25 last the Divisional Court set aside the surcharge.

The various statutes material for consideration, and the circumstances leading up to the said payment are as follows. Sect. 247 of the Public Health Act, 1875, which now applies to county councils, provides for the audit of the accounts of the council for every year, and by sub-s. 7 it is provided that "any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment," and it was in acting in pursuance of, and exercising his authority under, this section, that the Auditor disallowed the payment of the 700*l.*, and surcharged the amount on the members of the council above mentioned. By s. 20 of the Municipal Corporations Act, 1882, which by the Local Government Act, 1888, applies to county councils, it is provided that "the council shall require every officer appointed by them to give such security as they think proper for the due execution of his office, and shall allow him such remuneration as they think reasonable."

Immediately before the Roads Act, 1920, was passed, a Mr. Bottomley was the County Accountant of Durham County Council, and was in receipt of a salary of 1700*l.* per annum. The Act known as the Roads Act, 1920, received the Royal Assent on December 23, 1920. This Act imposed on county councils the duty of levying and collecting the duties on licences imposed by s. 13 of the Finance Act, 1920, as amended by the Roads Act, and provided for the payment of the sums so collected into a fund called the "Road Fund," and for certain payments to county councils of certain sums, out of the Road Fund. The section relevant to the consideration of the question involved in the present appeal is s. 3, sub-s. 4. This section provides as follows: "There shall be paid out of the Road Fund in every year—(*a*) to every county council by whom the said duties are levied an amount equal to the expenses properly incurred by that council in accordance with directions issued by the Minister [of Transport] with the approval of the Treasury in or in connection with the levying of the duties, the registration of vehicles, and the issuing of licences to drivers of vehicles, and such directions may provide for advances being made to county councils from time to time as may be necessary during the year on account of any expenses so incurred by them as aforesaid."

In a circular letter dated November 22, 1920, the Minister of Transport sent to various county councils, including Durham County Council, the form which he recommended for use for the purpose of stating the approximate estimate of the expenses to be incurred in respect of licences, and by a note to the form he said: "The Minister anticipates that,

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in many cases, it will not be necessary (especially with the larger authorities) to make an apportionment of existing salaries of chief administrative officers upon whom any new or extended duties may devolve in connection with registration and licensing. Where, however, local authorities consider that the increased duties and responsibilities thrown upon such officers require some addition to be made to their salaries, the Minister will be prepared to give the fullest consideration to any representations in this sense."

After the Act was passed the county council sent in documents described as quarterly estimates of expenditure actually incurred during the years 1921 to 1933. The first one supplied was an estimate of expenditure actually incurred and estimated to be incurred up to March 31, 1921. It was an estimate for one quarter, and it estimated the expenditure that would be incurred until March 31 in respect of supervisory staff at the sum of 50*l.* The same sum was included in the estimate of expenditure actually incurred during every quarter down to March 31, 1922. This is at the rate of 200*l.* per annum. After that date the quarterly estimates in respect of the supervisory staff appear at the reduced figure of 37*l.* 10*s.*, that is, at the rate of 150*l.* per annum. The sums appearing in these estimates were from time to time paid by the Minister out of the Road Fund to the county council, and were placed by them to the credit of the County Fund, but in respect of Mr. Bottomley's salary the county council did not incur any additional expense by reason of the additional work which by reason of the Road Act he was required to do when supervising the county council accounts. Until the year 1925 it must be taken that the council regarded his existing salary as a reasonable remuneration for all the work he was doing, including such additional work, and when the matter came up for consideration in the year 1925, it is beyond question that the council did not owe to their accountant any sum by way of additions to his salary. Whether they were or were not entitled to regard the moneys they had so received from the Minister of Transport as an apportioned part of the salary that they were paying the accountant, or whether they had improperly claimed the amount as an additional expense incurred under the Act when they had not incurred any such additional expense, is in my judgment irrelevant to the consideration of the questions involved in this appeal.

On February 4, 1925, there was included in the business of the county council the consideration of a report of the Finance Committee which contained the following recommendation: "We have considered and agreed to the following resolution passed by the Local Taxation Licences Committee viz. 'That the Salaries and Finance Committee be recommended to increase the County Accountant's salary by 100*l.* per annum as and from the first instant. The Ministry of Transport has since the coming into operation of the Roads Act, 1920, paid into the County Fund the sum of 600*l.* in respect of the County Accountant's supervision of the department and the County Accountant has up to the present received no extra remuneration for the additional work cast upon him.'"

The county council approved that report, and thereby, on consideration of the matters stated by the Finance Committee, increased the County Accountant's salary by 100*l.* per annum as and from January 1, 1925. Even if they could have done so, they did not purport to grant him ex post facto any additional salary for the years prior to the year 1925. There was no amendment or addition to the resolution passed at the meeting of the county council. The resolution stands by itself as a resolution to increase for the future the salary of the Accountant by 100*l.* per annum. There was no decision by the council that the consideration of paying him something additional in respect of the past years was postponed for further consideration, and the fact that some members of the council had discussed such an intention is entirely irrelevant to the questions we have to consider. The council could only act by a resolution duly proposed and passed, and no discussion between the members of the council, either in council or otherwise, can properly be treated as a decision of the council to adjourn the consideration of further remuneration in respect of the past years to some later date. The salary, as increased by the resolution of February 4, 1925, was paid each year down to July 29, 1931, and there is no record of any further consideration of the Accountant's remuneration until July 29, 1931, over six years later, when the council considered and approved the recommendation of the Salaries, Wages, and Hours Committee, which is in these terms : " We recommend the county council to pay to the County Accountant the sum of 700*l.* out of the moneys received from the Minister of Transport in respect of his services in the supervision of the Local Taxation Department, and that in future all moneys paid by the Minister in respect of the services of the Accountant be paid to the Accountant." It will be observed from the form of this recommendation that the sum of 700*l.* is to be paid in respect of the Accountant's services in the supervision of the Local Taxation Department, that is to say, for his services in the past, including the services in respect of which they had, in 1925, awarded him the additional salary of 100*l.* per annum, and, I suppose, in respect of his services before that date also, and they increased his salary for the future to the amount of all moneys paid by the Minister in respect of the services of the Accountant. It seems to me quite clear that the payment of the 700*l.* was made without consideration in respect of past services for which they had already paid him the amount thought reasonable under s. 20 of the Municipal Corporations Act, 1882. They were entitled in July, 1931, to say with regard to the future : " We think it reasonable that he should have as part of his reasonable remuneration all moneys paid by the Minister in respect of the services of the Accountant," but, in my judgment, the payment of 700*l.* in respect of services which the Accountant had carried out in return for his current salary before 1925, and in respect of his services after 1925, which the council had expressly measured by an addition of 100*l.* a year, was contrary to law within the meaning of the Public Health Act, and the Auditor was right in disallowing the item and surcharging the members of the council who were responsible for the resolution under which the amount was paid.

I think, however, that the members of the county council who voted for the resolution acted bona fide in the belief that inasmuch as the moneys had been received from the Minister on the representations contained in the quarterly estimates, it was their duty to hand over the moneys so received to the Accountant. I think they were mistaken, and the surcharge was right, but that they have made out a good case for relief.

I agree that the order of this Court should be as stated in my Lord's judgment.

MAUGHAM L.J. I am of the same opinion. The facts have been fully stated in the judgments just delivered, and but for the circumstance that we find ourselves bound to differ from the judgments in the Court below, I should not have thought it necessary to add any remarks of my own. So far as I understand the judgments of the Divisional Court we are in effect differing from them only because we take a different view of the resolution passed by the Durham County Council in the year 1925, a resolution which was regarded in that Court as being provisional, and as leaving over the question whether some further payment should be made to the County Accountant on a future occasion. I am unable to take that view of the resolution. I think insufficient attention has been given to the circumstance that the resolution of the council is in the form of an adoption of the report of the Finance Committee, which reads in the following terms: "We have considered and agree to the following resolution passed by the Local Taxation Licences Committee, namely, that the Salaries and Finance Committees be recommended to increase the County Accountant's salary by 100*l.* per annum as and from the 1st instant," that was from January 1, 1925. I pause there to say that what follows in the report of the Finance Committee is I think merely a reason for the recommendation. The report continues as follows: "The Ministry of Transport has since the coming into operation of the Roads Act, 1920, paid into the County Fund the sum of 600*l.* in respect of the County Accountant's supervision of the department and the County Accountant has up to the present received no extra remuneration for the additional work cast upon him." I cannot read this report of the Finance Committee as a suggestion to the county council that the salary of the County Accountant was being increased by 100*l.* per annum only as a temporary measure, and that their intention was that there should be a further increase of his salary ex post facto by some future action of the council. No reason whatever has been given for any such proposal being made by the Finance Committee, who might well have recommended an increase of the County Accountant's salary as and from January 1 by some sum large enough to absorb the amount paid into the County Fund by the Ministry of Transport in respect of his supervision of the department. I am driven to the conclusion that when the county council adopted the report in question they approved the definite recommendation to increase the County Accountant's salary by 100*l.* per annum, and they adopted also the reason given by the Finance Committee, founded as it was on a previous report of the Local Taxation Licensing Committee. Such a body as a county council necessarily acts by the resolution of a majority of the members present at a particular time, and in my view evidence is not admissible to show that some of the persons present and voting took a particular view of the resolution which they concurred in passing. I can well understand that opinions may differ on such a point as that of the meaning and effect of such a resolution as I am dealing with, but I find myself unable for the reasons given to agree with the view taken in the Divisional Court.

The position of a local authority like the Durham County Council in regard to the payment of salaries and wages has been finally determined by the House of Lords in the case of *Roberts* v. *Hopwood*. (1) The discretion conferred upon such a body must be exercised reasonably. The payments

(1) [1925] A. C. 578.

made are to be reviewed by the Auditor for the purpose of ensuring, amongst other things, wise and prudent administration. It is, I think, clear that the local authority cannot out of public moneys give gratuities to their officers or servants over and above their fixed salaries and wages. That I think is not in dispute. Further, I am of opinion that it is not within the powers of members of a local authority administering public funds to give to an officer or servant by formal resolution a fixed salary, and at the same time to reserve not merely to themselves in the current year but to a council meeting at some future date, with, it may be, a very different composition, a power to give a larger wage or salary to such an officer or servant so that the resolution shall have a retrospective application. It seems to me that a later resolution of that kind can be nothing other than one giving a gratuity to the officer or servant in question. Different considerations might well apply to a case where the officer or servant was asked to perform extra services in respect of a specified job or undertaking, on the understanding that as soon as the work was complete the authority would determine the amount of his special remuneration. The cases of *Reg.* v. *Ramsgate Corporation* (1) and *Edwards* v. *Salmon* (2) are both cases of that character, and they differ widely from the circumstances of the present case.

I have carefully considered the question whether the persons surcharged ought to be relieved, wholly or partly, from personal liability in respect of the surcharge, by virtue of the provisions of s. 2, sub-s. 2, of the Audit (Local Authorities) Act, 1927. It has to be proved that the person surcharged acted reasonably or in the belief that his action was authorized by law, and the Court has further to be satisfied that he "ought fairly to be excused." This subsection in effect follows the same principle as the provisions in relation to trustees: see s. 61 of the Trustees Act, 1925, reproducing Judicial Trustees Act, 1896, s. 3, and compare Companies Act, 1929, s. 372. I have come to the conclusion that upon the evidence put before us in this case we must

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(1) 23 Q. B. D. 66.

(2) 23 Q. B. D. 531.

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hold that the persons surcharged acted in the belief that their actions were authorized by law, and having regard to all the circumstances of the case we ought in our discretion to decide that they ought fairly to be excused, with however the consequences as to costs mentioned by Scrutton L.J. With regard to the question of the independent ratepayers who desired to have a right to appear for the purpose of supporting the surcharge I do not think it necessary to add anything to what Scrutton L.J. has said.

Appeal allowed, but relief granted.

Solicitors for Auditor: *Park Nelson & Co.*

Solicitors for Councillors: *Sharpe, Pritchard & Co., for Harold Jevons, Durham.*

Solicitors for ratepayers: *Doyle, Devonshire & Co., for Molineux, McKeag & Cooper, Newcastle-on-Tyne.*

J. S. H.

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June 25;
July 16.

GEORGE TROLLOPE & SONS *v.* MARTYN BROTHERS.

[1933. T. 1355.]

Principal and Agent—Commission—Purchase "subject to contract"—Vendor refusing to proceed—Implied term not to prevent agent earning commission—Damages.

The plaintiffs, who were estate agents, were instructed by the defendants to find a purchaser for certain property "subject to contract." The plaintiffs later wrote to the defendants in these terms: "With reference to our conversation . . . . we confirm your acceptance of the offer made by . . . . Major H., to purchase the freehold of this property subject to contract. . . . . We take this opportunity of confirming that in the event of the sale materializing we shall look to you for payment of the usual scale commission." The defendants replied as follows: "We have to acknowledge receipt of your letter . . . . and confirm our telephone conversation with you . . . . to accept the offer . . . . for this property, subject to contract. . . . . We also confirm that, in the event of this sale being satisfactorily completed, we shall pay you the usual scale of commission." An engrossment of the contract was signed by Major H., but the defendants then refused to proceed, whereupon the plaintiffs claimed commission or, alternatively, damages for breach of an implied term that the defendants would do nothing to prevent the plaintiffs earning their commission.

It was found as a fact that Major H. was ready and willing to buy the property:—

Held (Scrutton L.J. dissenting), that although in an agreement "subject to contract," the matter, as between vendor and purchaser, must be deemed to remain in negotiation until contracts are exchanged, there must, as between the plaintiffs and the defendants, be implied a term that if the purchaser introduced by the plaintiffs was ready and able to complete the contract, the defendants would not by refusing to complete prevent the plaintiffs from earning their commission, and as the defendants had, without just excuse, refused to complete, they were liable to the plaintiffs in damages, the proper measure of which in the circumstances was the amount of commission the plaintiffs would have earned had the transaction been completed.

Observations of Willes J. in *Inchbald* v. *Western Neilgherry Coffee, &c., Co.* (1864) 17 C. B. (N. S.) 733, 741, applied.

Raymond v. *Wooten* (1931) 47 Times L. R. 606, disapproved.

Decision of Horridge J. affirmed.

APPEAL from a decision of Horridge J.

The plaintiffs, who were estate agents, claimed commission in respect of the sale of certain property on behalf of the defendants and/or damages for preventing the sale going through.

The plaintiffs, who were instructed by the defendants to find a purchaser for the property, wrote to the defendants as follows: "With reference to our conversation on the telephone to-day, we confirm your acceptance of the offer made by Messrs. Hampton's client, Major Howard, to purchase the freehold of this property subject to contract for the sum of 20,500*l*. We enclose a copy of the offer, as requested, and shall be glad if you will kindly let us have a written acceptance in the usual manner. We understand that Messrs. Swepstone, Stone, Barber & Ellis are preparing the contract which they should forward to Messrs. G. W. Bower & Son, of 60 Lincoln's Inn Fields, W.C. We take this opportunity of confirming that in the event of the sale materialising we shall look to you for payment of the usual scale commission." To that letter the defendants replied: "We have to acknowledge receipt of your letter dated the 21st instant, and confirm our telephone conversation with you, when we instructed you to accept the offer of 20,500*l*. for this property, subject to contract. We have instructed our solicitors, Messrs. Swepstone, Stone, Barber & Ellis, Broad Street House, Old Broad Street, E.C., to prepare the contract and forward same to Messrs. G. W. Bower & Son, of 60 Lincoln's Inn Fields, W.C. We also confirm that, in the event of this sale being satisfactorily completed, we shall pay you the usual scale of commission."

An engrossment of the contract was sent to and was signed by Major Howard. It was said, however, on behalf of the defendants that Major Howard was not ready and willing because in a letter from his solicitors to the defendants' solicitors there had occurred this passage: "In accordance with our telephone message, we are engrossing the contract herein, preparatory to exchange. You can doubtless satisfy us on the few outstanding points when we call for this purpose." The defendants refused to proceed further with the sale. After hearing evidence, Horridge J. was satisfied that the only matters outstanding had nothing to do with the signing or carrying out of the formal contract.

Horridge J. found that Major Howard was ready and willing to buy the property and that the only thing that prevented the contract going through was that the defendants intimated that the matter was off. He accordingly held that although the plaintiffs were not entitled to commission as such they were entitled to damages by reason of the defendants preventing the sale going through and the contract being signed, and he gave judgment in favour of the plaintiffs for 365*l*.

The defendants appealed.

Morle for the appellants. It is not contested that Major Howard agreed to buy the property, but there was no contract and the matter went off. The sale did not "materialize" and was not "satisfactorily completed" and by reason thereof no right to commission or damages in lieu of commission accrued to the respondents. Under a contract such as this the agent takes the risk of the vendor not going on. The words "subject to contract" as between vendor and purchaser

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clearly introduce a condition—see *Chillingworth* v. *Esche* (1) but the judgment of Horridge J. involves this, that those words have no effect as between vendor and his agent. That cannot be right. In *Keppel* v. *Wheeler* (2), Bankes L.J. said this (3): "I pause here to state plainly what is now well established, that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged"; and in this case these conditions were not satisfied. The language of Lindley L.J. in *Peacock* v. *Freeman* (4) are exactly applicable to the facts of this case; he there said: "The meaning of the contract was that if a sale were effected commission should be payable; if there was an abortive sale commission should not be payable."

[SCRUTTON L.J. referred to *Prickett* v. *Badger*. (5)]

There the words "subject to contract" were not present, and that differentiates that case from the present. Nor do the words appear to have been present in *Hankinson & Sons* v. *Vickers* (6) or in *Kinghan* v. *Simmons*. (7) The later case of *Raymond* v. *Wooten* (8) is exactly in point. There an agent procured an offer to purchase "subject to contract" and that offer was accepted "subject to contract," but the sale subsequently went off owing to the vendor obtaining a better offer. The Divisional Court (Swift and Charles JJ.) held that the agent could not recover commission from the vendor as there was no binding contract, or damages, as the vendor had not committed a breach of contract whereby the agent was prevented from earning his commission.

S. R. Sidebottom for the respondents.

[SCRUTTON L.J. Has the sale "materialized" or been "satisfactorily completed"?]

No, and therefore we cannot claim commision but we are entitled to damages owing to having been wrongfully prevented from earning commission. In this contract there must be implied a term that the vendors will do nothing to prevent the respondents earning their commission: see *Inchbald* v. *Western Neilgherry Coffee, &c., Co.* (1), where Willes J. said this (2): "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it." Implied terms have frequently been read into such contracts: see, for example, *Nosotti* v. *Auerbach* (3). *Roberts* v. *Barnard* (4) is an authority for the proposition that where an agent is wrongfully prevented from earning his commission the damages recoverable are the full amount of the commission he would have earned.

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(1) [1924] 1 Ch. 97.
(2) [1927] 1 K. B. 577.
(3) Ibid. 584.
(4) (1888) 4 Times L. R. 541, 542.
(5) (1856) 1 C. B. (N. S.) 296.
(6) (1931) Estates Gazette Digest, 16.
(7) (1931) Ibid. 225.
(8) 47 Times L. R. 606.

Morle replied.

Cur. adv. vult.

July 16. The following judgments were read:-

Scrutton L.J. George Trollope & Sons, estate agents, claim from Martyn Brothers, owners of property, commission for introducing a ready, willing and able purchaser at the price at which Martyns employed them to sell, and say it is no answer to their claim for commission that Martyns declined to sign the agreement of purchase, the terms of which the solicitors on each side had agreed, and the purchaser for his part had signed.

The employment was at first to secure a special applicant "at the price of 24,000*l.* subject to contract." This became abortive, and Trollopes offered a purchaser of the freehold ground rent at 11,000*l.* or 11,825*l.*, subject to contract. This was refused. Trollopes then offered a purchaser of the freehold at 20,000*l.*, subject to contract. Negotiations took place, resulting in the acceptance of an offer by Major Howard of 20,500*l.* for a named freehold property "subject to contract." The terms as to commission to Trollopes, the agents employed

(1) 17 C. B. (N. S.) 733.
(2) Ibid. 741.
(3) (1899) 15 Times L. R. 140.
(4) (1884) Cab. & E. 336.

by Martyns to effect this arrangement, are in writing. On April 21, 1933, Trollopes wrote to Martyns: "We take this opportunity of confirming that in the event of the sale materialising we shall look to you for payment of the usual scale commission." April 24, 1933: Martyns to Trollopes: "We also confirm that in the event of this sale being satisfactorily completed we shall pay you the usual scale of commission."

There is no dispute that the sale did not "materialize," nor was it "satisfactorily completed." Signed contracts were never exchanged, though the purchaser had signed his engrossed part. There is no dispute that Howard was a ready, willing and able purchaser, introduced by Trollopes, in that Martyns could have given a good title if they had wanted to. But there is no dispute that on the contract as expressed in writing the event had not happened which entitled the agents to their commission. McCardie J. in *Houlder* v. *Manx Steamship Co.* (1) collected a series of authorities in which in such circumstances the agent failed to recover his commission. I refer to them without repeating them. How then can the agent recover his commission? The suggestion is on a quantum meruit. The answer to this is that there is a contract in writing, and as Lindley L.J. said in *Lott* v. *Outhwaite* (2): "It was said that there was an implied contract to pay the agent a quantum meruit for his services. The answer was that there could be no implied contract when there was an express contract." McCardie J. collects in *Houlder's* case (1) a series of authorities to that effect and repeats them in *Bentall, Horsley & Baldry* v. *Vicary*. (3)

The other suggestion is that there is a claim for damages based on an implied contract which may be expressed in the language of Willes J. in *Prickett* v. *Badger* (4), when he said that the agent "proceeded to find a purchaser for the land; and it was only the defendant's disinclination or inability to proceed that prevented the sale being completed. The plaintiff would have been entitled to receive the commission

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(1) [1923] 1 K. B. 110, 113, 114.

(2) (1893) 10 Times L. R. 76, 77.

(3) [1931] 1 K. B. 253, 262.

(4) 1 C. B. (N. S.) 296.

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agreed on, if the defendant's conduct had not prevented his earning it." It must be noted that in *Prickett* v. *Badger* (1) it was the defendant's "inability" to proceed that caused the difficulty; he had no title to the land he purported to sell. In *Appleby* v. *Myers* (2), where an accidental fire prevented work being completed on the premises on which the work was to be done, Blackburn J. used this language: "If by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a quantum meruit." The same language is used by the Privy Council in *Forman & Co. Proprietary, Ld.* v. *The "Liddesdale"* (3), when the plaintiff in a lump sum contract for repairs did work he was not employed to do, and, I should add, did not do work he was employed to do, and it was held he could not recover for the work he had done within the terms of his authority. The Court referred to Blackburn J.'s judgment in *Appleby* v. *Myers* (2), which, they said, mentioned two conditions under which a contractor for a lump sum who had not performed the stipulated work can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done. There are numerous other cases where such language is used, as "the default of the defendant," and "prevented by the fault of the defendant." Mere "prevention" needs careful limitation. Prevention where the defendant has no, or a defective, title is one thing, but some "preventions" clearly give no right to the agent.

For instance, A employs two separate agents, B and C, to bring a purchaser at 1000*l.* B does so and finds that C has already brought another purchaser whom A has accepted. Has A "prevented" B from earning his commission so as to give B a good claim against him? Clearly not. A is not "in fault." Again A appoints B as "sole agent" and then himself sells to a person whom B knows nothing about. Has A

(1) 1 C. B. (N. S.) 296.

(2) (1867) L. R. 2 C. P. 651, 659.

(3) [1900] A. C. 190.

"prevented" B from earning his commission so as to give B a claim against him. McCardie J. has had this case before him in *Bentall, Horsley & Baldry* v. *Vicary* (1), and has decided that B has no claim. There is no express contract forbidding A from himself selling; he is only forbidden to employ any other agent than B, and as to implication, it can only be made if the term is "necessary"; it is not enough to say it is "reasonable." I refrain from doing more than mention *The Moorcock.* (2) Lord Esher expresses the rule in *Hamlyn & Co.* v. *Wood & Co.* (3): "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." I myself have given a long judgment on the cases involved in *Lazarus* v. *Cairn Line.* (4) In my opinion the proposition that if the employer prevents the agent from earning his commission he is liable, is much too wide. The prevention must be a fault or a default, in the sense that it is a breach of an express contract, or of some contract that must of necessity be implied, as where the employer has no title to the property he contracts to sell, or in breach of contract does not perform a term of the contract. In my opinion the "prevention" by the employer must be "wrongful," a "default," a breach of his contract with the purchaser to entitle the agent to base an action upon it. Mr. Bowstead heads his Art. 65 "if he wrongfully prevents."

What then is the position of an employer who has employed the agent to procure a purchaser at a price "subject to contract," and who refuses to sign the contract his solicitors have prepared. He has broken no contract with the purchaser who is ready to sign. As Bankes L.J. says in

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(1) [1931] 1 K. B. 253.
(2) (1889) 14 P. D. 64.
(3) [1891] 2 Q. B. 488, 491.
(4) (1912) 17 Com. Cas. 107.

Keppel v. *Wheeler* (1): "I . . . . state plainly what is now well established, that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged." This is more fully explained by Sargant L.J. in *Chillingworth* v. *Esche* (2), and his statement is approved by Lord Buckmaster in *May and Butcher, Ld.* v. *The King*. (3) The employer therefore broke no contract with the purchaser when he refused to sign and exchange a formal contract. The event did not happen which the agent expressly agreed should entitle him to commission, and no wrongful act of the employer, no breach of his contract with the purchaser prevented it from happening. There is no necessary implication of a term which the parties have not expressed, a term that an agent who procures a purchaser "subject to contract" is entitled to a commission though the employer only does what he has a right to do, that is, refuses to agree and exchange a formal contract.

Agreeing with a great deal of this judgment, Maugham L.J. takes the view, as I understand his judgment, that although the implied term that the employer must not "prevent" the agent from earning his commission is too wide, it is "necessary" to imply a term that the employer shall not "without just cause" prevent the agent from earning his commission, and as a corollary that if he "arbitrarily" (by which phrase I understand him to mean "without alleging any just excuse") refuses to sell, he is in default, though in an agreement subject to contract he breaks no contract with the purchaser by refusing to complete without giving any reason. I cannot agree with this view, which seems to make the subsidiary matter, the remuneration of the agent who is to obtain a contract of sale, as of more importance than the sale itself, which without breach of any contract with the purchaser has not been completed or materialized. It does not seem to me that a vedorn taking an attitude towards the purchaser which by his contract he is entitled to adopt, if he gives no reason why he so acts except that it is in the bond, is acting arbitrarily and therefore in some unspecified default. Every man who receives and refuses without giving a reason an offer which he is not bound to accept, may be said to act arbitrarily, but I cannot understand why he is in default.

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(1) [1927] 1 K. B. 577, 584.

(2) [1924] 1 Ch. 97, 113.

(3) Ante pp. 17*n*., 20*n*.

I do not trouble to consider recent Divisional Court cases of which we have no adequate reports except to say that in *Raymond* v. *Wooten* (1) the judges obviously gave a decision contrary to their previous decision because they were referred to the remarks of Bankes L.J. in *Keppel* v. *Wheeler* (2), of which they were previously unaware.

The decisions of the Court of Appeal reported only in the Times Law Reports seem to me either to support, or not to contradict the view I have taken. In *Peacock* v. *Freeman* (3) the Court declined to give the auctioneer any commission, other than the commission agreed, if no sale took place, and the Master of the Rolls said that to give the agent any further right there must be a default on the part of the employer, something contrary to the contract, something wrong done, and there the contract with the purchaser entitled the vendor to do what he did. In *Grogan* v. *Smith* (4) there never was any binding contract with the purchaser, and therefore the agent recovered no commission. In *Lott* v. *Outhwaite* (5) there was an agreement to pay commission if a sale was completed, and the sale was not completed because the purchaser had not the money to complete; obviously it followed that the agent got no commission. I do not see how Lindley L.J.'s statement that the agent could have earned commission if the vendor had been in default helps the matter, until "default" has been defined. Lindley L.J. refused compensation on a quantum meruit, though part of the property had been sold.

Lastly, in *Nosotti* v. *Auerbach* (6), it was held that where there was a contract of sale to give possession in a reasonable time, and the vendor refused to give such possession, the agent

(1) 47 Times L. R. 606.
(2) [1927] 1 K. B. 577, 584.
(3) 4 Times L. R. 541.
(4) (1890) 7 Times L. R. 132.
(5) 10 Times L. R. 76.
(6) 15 Times L. R. 140.

was entitled to recover commission. There the vendor broke his contract with the purchaser and was clearly in default.

For these reasons I should reverse the judgment of Horridge J., but as my brethren are of a different opinion, the judgment will be as they propose.

GREER L.J. The claim of the plaintiffs in this case, so far as it is necessary to consider it having regard to the abandonment of the other claims contained in the statement of claim, was a claim for commission arising by reason of the employment of the plaintiffs by the defendants as their agents for the sale of certain property in High Street and Great Eastern Street, Shoreditch, on terms which appear by a letter from the plaintiffs to the defendants dated April 21, 1933, and the defendants' reply dated April 24, 1933; alternatively, the plaintiffs put their claim as a claim for damages on the ground that it was an express or implied term of the said agreement that the defendants would do nothing to prevent the plaintiffs from earning the said commission, and the defendants had committed a breach of that express or implied term by refusing to complete the purchase of the property on the terms on which the purchaser introduced by the plaintiffs agreed to buy. The plaintiffs' letter of April 21, says: "208, 210 and 211, High Street, Shoreditch, and 2, 4, 6 and 8, Great Eastern Street. With reference to our conversation on the telephone to-day we confirm your acceptance of the offer made by Messrs. Hampton's client, Major Howard, to purchase the freehold of this property subject to contract for the sum of 20,500*l.* We enclose a copy of the offer, as requested, and shall be glad if you will kindly let us have a written acceptance in the usual manner. We understand that Messrs. Swepstone, Stone, Barber & Ellis are preparing the contract which they should forward to Messrs. G. W. Bower & Son, of 60, Lincoln's Inn Fields, W.C. We take this opportunity of confirming that in the event of the sale materializing we shall look to you for payment of the usual scale commission." The defendants' reply on April 24 is in the following words: "We have to acknowledge receipt of your letter dated the 21st inst., and

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confirm our telephone conversation with you, when we instructed you to accept the offer of 20,500*l*. for this property, subject to contract. We have instructed our solicitors, Messrs. Swepstone, Stone, Barber & Ellis, Broad Street House, Old Broad Street, E.C. to prepare the contract and forward same to Messrs. G. W. Bower & Son of 60, Lincoln's Inn Fields, W.C. We also confirm that, in the event of this sale being satisfactorily completed, we shall pay you the usual scale of commission." Both letters describe the offer of the purchaser who was found by the plaintiffs, as an offer of 20,500*l*. for the property, subject to contract. It is undoubtedly the law that as between vendor and purchaser, the matter must be deemed to remain in negotiation until a form of contract is settled, and contracts are exchanged. But it does not follow from this that the plaintiffs would necessarily be without remedy if the purchaser they introduced was ready and willing to sign the contract in the form in which he was asked by the vendor to sign it, and the vendor thereafter withdrew from the negotiations. In my judgment the defendant's letter of April 24 involves an implied undertaking that if the purchaser introduced by the plaintiffs was ready to complete the contract on the terms put forward by the vendor, they would not by refusing to complete prevent the event from happening which would entitle the plaintiffs to their commission. I think the two letters must be construed in the light of the numerous decisions as to what, in the absence of agreement to the contrary, are the rights of a commission agent who has been employed to introduce a purchaser. The rights of a commission agent employed to find a purchaser where there is no stipulation "subject to contract" have been frequently considered by the Courts. In *Prickett* v. *Badger* (1), where an agent had been employed on the terms that if he found a purchaser at a price of about 650*l*. per acre, he should have a commission of 1½ per cent. upon the amount of the purchase money. The plaintiff received an offer of 675*l*. per acre from the Birkbeck Land Society, and passed it on to the defendant. It then turned out that the defendant

(1) 1 C. B. (N. S.) 296.

had no interest in the property, and could not make any sale to the Society at all. It was held by the Court, consisting of Williams, Crowder and Willes JJ., that the plaintiff was entitled to recover a quantum meruit for the work done which proved abortive by reason of the wrongful withdrawal of the plaintiff's authority to sell. I cannot think that the decision would have been different if, instead of being unable, the vendor had been merely unwilling to complete the sale. I read that case as meaning that the Court thought there was implied in the engagement of the plaintiff an undertaking that the defendant would not after the plaintiff had completed his work withdraw the plaintiff's authority to sell at the price mentioned to him when he received his authority. The general principle was applied by the decision of the Court of Common Pleas in *Inchbald* v. *Western Neilgherry Coffee, &c., Co.* (1) to a case in which the plaintiff had not done the work he had been employed to do. The contract there was to pay to the plaintiff, who was employed as a stockbroker in and about the selling and disposing of the shares of the company, the sum of 100*l.* down and 400*l.* in addition on the allotment of the whole of the shares of the company. The defendants, who had prevented, by winding up the company, the allotment of the whole of the shares, were held liable for damages because by causing the winding up they had prevented the allotment, and the damages were fixed at 250*l.* In the course of his judgment Willes J. says (2): "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it." This observation is, perhaps, too widely stated, but in so far as it states an obligation not to do any act which prevents the person entitled to receive the money from receiving it, it accords with the law as laid down in other cases—such, for example, as *Fisher* v. *Drewett* (3), a decision of the Court of

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(1) 17 C. B. (N. S.) 733.

(2) Ibid. 741.

(3) (1878) 48 L. J. (Q. B.) 32.

Appeal. The headnote of that case reads as follows: "The defendant entered into the following contract with the plaintiff—'In the event of your procuring me the sum of 2000*l.*, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received.' The plaintiff procured a party willing to lend 1625*l.* if the defendant showed a sufficient title to his security. The defendant accepted the offer, but failed to show a sufficient title. The negotiations consequently went off, and no money was in fact received by the defendant :—*Held*, that the plaintiff was notwithstanding entitled to his commission on the 1625*l.*, as it was owing to the defendant's own default that he never received the sum, and the plaintiff had performed all his part of the contract. *Semble*—per Bramwell L.J., that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced." In the course of his judgment Bramwell L.J. says (1): "Now the current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced. . . . . However, even if the rule that the agent is entitled to his commission when he has done his part, whatever may happen subsequently to prevent his work having effect, is confined to the case where the failure has arisen through the default of the employer, the defendant will not profit, for he has given no evidence of the default being in any one but himself." The same rule was applied by Mathew J. in *Roberts* v. *Barnard* (2) and was restated by Lord Esher in *Grogan* v. *Smith* (3), though on the facts the Court decided against the claim on the ground that in that particular case the plaintiff had not found a purchaser on terms which had been agreed between the purchaser and the defendant.

(1) 48 L. J. (Q. B.) 33.
(2) Cab. & E. 336.
(3) 7 Times L. R. 132.

It is to be observed that the contract between the plaintiffs and the defendants made by the letters of April 21 and April 24, related to commission in the event of the completion of a sale of the property "subject to contract." It is quite true that commission in terms would not become due until the satisfactory completion of the sale, but I think the agreement means that if the purchaser from whom the plaintiffs had obtained the offer for the property subject to contract was prepared to sign a contract in the terms required by the owners, they would do nothing to prevent the satisfactory completion of the transaction so as to deprive the plaintiffs of the commission which they had agreed to pay. The learned judge in the Court below has based his finding on a breach of the implied term of the contract which prevented the plaintiffs from earning their commission, and has assessed the damages at the amount of the commission that would have become payable if contracts had been signed and exchanged, and the sale completed by conveyance.

The appellants relied upon the decision of the Court of Appeal in *Keppel* v. *Wheeler* (1), but in my judgment this decision does not help them, as the Court held that the agents were entitled to their commission but were liable in damages for breach of a duty in not communicating an offer received for an additional price before the completion. I note that Bankes L.J. says (2): "In these circumstances, I am not going to discuss all the matters which have been debated in testing this question whether the agency had or had not determined, because it seems to me that an agent may well say: 'I have done everything which, assuming that the matter went through, would entitle me to receive my commission', and yet remain under the obligation of an agent to disclose such matters as the particular offer in this case." The opinion expressed, in my judgment, is, I think, inconsistent with the decision of Swift and Charles JJ. in *Raymond* v. *Wooten* (3), but in my opinion that case was not rightly decided.

The view I take of the present case may be shortly stated as follows. The service for which the defendants engaged Messrs Trollope & Sons was, that they would introduce as a purchaser of the property in question their customer Major Howard who would be prepared to buy on the terms of contract prepared by the defendants' solicitors and approved by Major Howard's solicitors. When the latter assented to the terms of contract sent by the vendors' solicitors, and on behalf of the buyer indicated the latter's acceptance of those terms, the plaintiffs had completed the work they had undertaken to do, though the vendor might still have been free to refuse to sign the contract, without any liability on his part to the proposed purchaser. But as between the plaintiffs and the defendants, the latter could not after the plaintiffs' work was complete deprive them of the fruits of their work by withdrawing their consent to the signing of the contract and the completion of the sale. I think this view is in accordance with the trend of the decisions I have cited. Cases like *Bentall, Horsley & Baldry* v. *Vicary* (1) which show that before the agent's work is complete the owner can himself sell the property do not, in my judgment, affect the question whether the withdrawal can be effected after the agent's work is complete. It is not easy to reconcile all the decisions on the question as to what terms may properly be implied as between an agent working for commission and his principal, with regard to the obligations of the principal to pay commission. Cases like *Rhodes* v. *Forwood* (2) and *Lazarus* v. *Cairn Line* (3) do not, in my judgment, apply to a case like the present. Those cases involve the proposition that on contracts in the terms employed therein, there was not implied, as between the principal and the agent, an undertaking that the principal would continue to carry on his business so as to enable the agent to do the work he had undertaken to do, and so earn the commission provided for by his contract. But in none of these cases has it been held that the principal could, after all the agent's work had been completed, deprive the agent of his commission. If, for example, in the case of *Lazarus* v.

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(1) [1927] 1 K. B. 577.

(2) Ibid. 586.

(3) 47 Times L. R. 606.

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(1) [1931] 1 K. B. 253.
(2) (1876) 1 App. Cas. 256.
(3) 17 Com. Cas. 107.

Cairn Line (1) the agent had in fact sold tickets before he had any knowledge of the sale of the principal's business, I am inclined to think the decision would have been in favour of the agent. It is quite another thing to say that there was an implied term that the principal would continue his business for the purpose of enabling the agent to do work which would have entitled him, if the principal's business had continued, to commission which he had not at the time of the discontinuance of the principal's business in fact earned. In my judgment, having regard to the terms of the contract between the plaintiffs and the defendants in this case, there was an implied undertaking by the defendants that they would not after the plaintiff's work was completed deprive them of the fruits of their labour by refusing to sign the contract tendered to the plaintiffs' buyer by the defendants' solicitors with their authority, or by refusing without just cause to complete the transaction on the terms to which they had asked the plaintiffs' customer to consent. I think such a term may be implied in the contract contained in the two letters to which I have called attention. Adopting the words of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (2) I am of opinion, on considering the terms of the contract in the present case in a reasonable and businesslike manner, that an implication necessarily arises that the parties must have intended that there should be a stipulation in favour of the agent that when the agent had done all that he had contracted to do, the principal would not by withdrawing, without reasonable cause, so far as the agent was concerned, from the transaction, deprive the agent of the commission which would become due if the sale with his customer had been completed. I have not thought it necessary to deal with all the cases that have been cited. I have, however, had the opportunity of reading the judgment about to be delivered by Maugham L.J. and I agree with what is there stated with regard to the decisions in the cases of *Peacock* v. *Freeman* (3) and *Nosotti* v. *Auerbach*. (4)

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(1) 17 Com. Cas. 107.

(2) [1891] 2 Q. B. 488, 491.

(3) 4 Times L. R. 541.

(4) 15 Times L. R. 140.

In my judgment the decision of Horridge J. was right, and this appeal should be dismissed with costs.

Maugham L.J. In this case the learned judge has decided that the plaintiffs are entitled to the sum of 365*l.* damages on the ground that the defendants who employed the plaintiffs were prevented by the latter from earning a commission amounting to that sum. In this Court the facts are not in dispute for counsel for the appellants accepted, for the purposes of a clear and careful argument, the findings of fact of the learned judge. I do not think it necessary to repeat the terms of the various letters from which the contract between the plaintiffs and the defendants is to be gathered and the subsequent history of the case is to be ascertained; but it is material to note the finding of the learned judge that on May 23, 1933, Major Howard was ready and willing and able to enter into a formal contract with the defendants and to complete the same; that the only thing that prevented the contract from being signed was that the defendants on May 24 telephoned saying that the matter was off and that they were not prepared to exchange the parts of the contract which had been engrossed (one part indeed having been actually signed by Major Howard, the intending purchaser), and, finally, that the sole cause of the matter not going through was the default of the defendants. The questions that arise are three in number: First, what were the terms of the contract of employment between the plaintiffs and the defendants, which admittedly were contained in the correspondence. The second is whether there is in the contract an implied term that the defendants would not do anything to prevent the plaintiffs from earning their commission or some other similar term. The third is whether the defendants have broken the implied term, if any, so as to justify a claim by the plaintiffs on the footing of breach of contract, or, treating the contract as rescinded, on a quantum meruit.

On March 17, 1933, the plaintiffs informed the defendants that they had a client who might make an offer for the defendants' property, and they added that they assumed "in the event of our securing a purchaser you will pay us the usual scale commission." This letter does not seem to have been replied to in writing, but on April 21, 1933, the plaintiffs, following a conversation on the telephone with the defendants, wrote confirming the acceptance by the defendants of an offer made by a Major Howard to purchase the freehold of the property "subject to contract" for the sum of Twenty thousand five hundred pounds (20,500*l.*). They stated in this letter with regard to the commission as follows: "We take this opportunity of confirming that in the event of a sale materialising we shall look to you for payment of the usual scale commission." The reply of April 24 contained this passage: "We also confirm that in the event of this sale being satisfactorily completed we shall pay you the usual scale of commission." It is not clear to me that the words "satisfactorily completed" in this letter, having regard to the preceding context, refers to anything but the exchange of a formal contract for sale, though they might refer to the completion of such a contract; but in my opinion nothing turns upon this question having regard to the findings of fact to which I have referred, and I am willing to assume for the purposes of the present case that the defendants were agreeing to pay the usual scale of commission only in the event of the sale being completed in the usual sense, which of course would involve payment of the purchase price and a conveyance. In this case then the plaintiffs will not, as in the much more common case as between house agent or estate agent and vendor, be entitled to their commission merely because they find a purchaser ready and willing to pay the purchase money and to comply with the other terms, if any, of the contract between the defendants and the purchaser. Counsel for the defendants argued on the footing that the defendants were at liberty to change their minds at any time and to refuse to proceed with the matter unless a formal contract had been executed binding both the plaintiffs and the defendants. He contended that inasmuch as the offer of 20,500*l.* by Major Howard was "subject to contract," the matter was still in the realms of negotiation and that accordingly no commission was payable under the agreement between the plaintiffs and the defendants, and that no contract could be implied in the agreement which the defendants have broken.

In my opinion the fact that there was an offer and acceptance "subject to contract" presents no difficulty in this case and, properly considered, is an irrelevant circumstance. Ever since the case of *Winn* v. *Bull* (1), if not long before, it has been well settled that the result of an offer "subject to contract," means that the matter remains in negotiation until a formal contract is executed, that is, if the contract is recorded in two parts, until the formal contracts are exchanged. The cases are referred to in *Keppel* v. *Wheeler* (2), and see per Bankes L.J. (3) Taught by experience in these Courts it is every-day practice for intending purchasers of property who are making an offer to make their offer in the form of "subject to contract," with the result that they are not at that time bound and have a locus penetentiæ until the formal contracts are exchanged. I am unable to see how that undoubted circumstance has any real bearing on this case, for to me at least it is manifest that the plaintiffs were not earning a commission by "finding a purchaser," to use the popular phrase, who was in no way bound to purchase. The strongest supporter of the rights of house agents would hardly, I think, contend for the contrary view. The words in the letters which contain the well-worn phrase ought to be read simply as meaning that the parties were willing to continue negotiating, one term of the expected contract, namely, that with reference to price, being provisionally accepted, and either party being at liberty to terminate the negotiations. The negotiations in this case went on and at a later date, namely, by May 23, 1933, the plaintiffs had done everything which it lay in their power to do in the matter. A binding contract was never in fact entered into, since it is well settled that solicitors have no authority to sign a memorandum sufficient to satisfy the legal requirements of what used to be the Statute of Frauds (now s. 40 of the Law of Property Act, 1925); and it is, I think, perfectly plain that in the circumstances the plaintiffs did not in terms earn the commission payable under the contract. But although the plaintiffs did not earn their commission by finding a purchaser who in the first instance was only willing to negotiate, by the later date they had found a purchaser, Major Howard, who was willing to agree to every term of the contract put forward on behalf of the defendants. Major Howard in fact executed his part of the contract and his solicitors wrote that they were ready to exchange. The finding of the learned judge above stated was therefore completely justified. The sole cause of the matter not going through was the default of the defendants. By "default" I mean a refusal without any reasonable ground to proceed with the matter.

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(1) (1877) 7 Ch. D. 29.

(2) [1927] 1 K. B. 577.

(3) Ibid. 584.

The question then remains whether there was not an implied term in the circumstances that the defendants would not prevent the plaintiffs from earning their commission. In my opinion where a person is employed to do work on behalf of another, payment to be made on completion of the work, there is a necessary implication that the employer will not do anything to prevent the earning of the remuneration, unless at any rate he has some just excuse for his interference with the course of events obviously contemplated by both parties when they entered into the contract of employment. Cf. *Appleby* v. *Myers*. (1) The rule is one of general application, and many illustrations might be given. If a man employs another—whether an artist or a plumber—to do work for him and if after he has proceeded for some time with the work the employer refuses to allow him to complete it, there can be no doubt that generally speaking an action would lie on a quantum meruit, or for damages based on breach of contract. Another example is afforded by a building or construction contract which provides for payment on the architect's or on the engineer's certificate. In such

(1) L. R. 2 C. P. 651, 659.

a case it is plain that the employer becomes liable if he takes steps to prevent a proper certificate being given. The cases of houseowner and agent are not so simple, because although there is a superficial sameness about them, the facts are often very different. The houseowner in London is generally approached by many agents, all of whom desire and sometimes clamour to find a purchaser for him. The terms of the employment are seldom discussed. The price suggested is frequently not obtained, but lower offers are made tentatively through various agents. An offer made through one agent and provisionally accepted may be followed before the owner is bound by a better unconditional offer from another. I doubt very much whether a general rule can be laid down for these cases, since the circumstances of such cases may widely differ and the nature of what I have called a just excuse may differ with those circumstances.

The illustrations given by Scrutton L.J. seem to me to demonstrate that a term to the effect that the employer will do nothing to prevent the agent from earning his commission (without any qualification) is too widely expressed. If A employs two or more agents to find a purchaser at 1000*l.* and each is aware that A is employing more than one agent, there is, I think, a necessary implication that the first of them to find such a purchaser and to give his name wins the competition and is entitled to the prize. If A appoints B his sole agent and then himself finds a purchaser, I see no reason to doubt that McCardie J. was right in coming to the conclusion that A has not by implication agreed that he will not himself find a purchaser: *Bentall, Horsley & Baldry* v. *Vicary.* (1) The possible diversity of circumstances is almost endless, and I will give another illustration. A employs B his agent to find a purchaser for his house at a given price, and after such a purchaser has been found and has entered into a contract to purchase, it turns out that A has only a good holding title but not one which he can force on the purchaser, and the latter declines to complete. Can the agent insist on payment of the commission? A

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(1) [1931] 1 K. B. 253.

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variant of this case was considered by the Court of Appeal in *Peacock* v. *Freeman*. (1) Yet another case may be mentioned: B finds a purchaser, but by the agreement B is entitled to his commission only on completion of the purchase. It is never completed because the purchaser cannot find the money. There is plainly no default whatever by A, and B therefore is entitled to nothing: *Lott* v. *Outhwaite*. (2)

For the purposes of the present case it is, I think, sufficient to say that no excuse whatever has been put forward on behalf of the defendants, and their conduct in refusing to exchange the engrossed contracts seems to have been purely arbitrary. It is therefore unnecessary to consider what the conclusion would have been, if the refusal to go on with the matter had been due to the receipt of an unconditional higher offer from some third party, and I will not now express any opinion whether that would have made a difference in the present case. I am content to rest my decision on the view that the sole cause of the commission not being earned by the plaintiffs was the arbitrary act, that is, the default, of the defendants, and this I understand to be the view which commended itself to Horridge J.

Coming now to the chief authorities, I would observe that there are a large number of cases in which the implication has been made that a defendant who is liable to pay money to a person employed by him upon a given event is not at liberty to do any act which prevents the other party from receiving the money. For the present purpose *Prickett* v. *Badger* (3) in the Exchequer Chamber is very much in point. It was there held by four judges including Willes J. that where an agent employed for an agreed commission to sell land at a given price succeeds in finding a purchaser at the stipulated price and the employer declines to sell and rescinds the agent's authority the latter is entitled to sue on a quantum meruit for his work and labour on the ground that the performance of the contract was prevented by the wrongful act of the defendant. The case was very elaborately argued after verdict for the plaintiff upon a rule nisi for a new trial, on the ground of misdirection, and Willes J. observes, to cite only a short passage from his judgment (1): "It is quite clear that the plaintiff was entitled to some remuneration. In pursuance of the retainer, he proceeded to find a purchaser for the land; and it was only the defendant's disinclination or inability to proceed that prevented the sale being completed. The plaintiff would have been entitled to receive the commission agreed on, if the defendant's conduct had not prevented his earning it". It is true that in that case the contract by the plaintiff was only to find a purchaser, but the doctrine that the defendant was not at liberty to prevent the commission being earned is one which in my opinion will apply to the present case. The next authority which I think should be cited is the case of *Peacock* v. *Freeman.* (2) In that case the defendants were the well known auctioneers who carry on business under the name of Aldridges, and the plaintiffs, who were acting on behalf of mortgagees, were desirous of putting up certain property for sale. There was an agreement to pay a special scale fee, and the property was put up for sale and knocked down to a substantial purchaser who paid the usual deposit to the auctioneers. Part of the property was leasehold and held by a Mr. Long upon a long lease in which there was a covenant against assignment. Long, however, was bankrupt, and the purchaser in his requisitions upon title required the lessor's consent to the assignment and the concurrence of Long's trustee as a party. The plaintiffs were apparently unable to comply, and thereupon rescinded the contract of sale under a well known condition contained in the auction conditions, and they repaid the deposit to the purchaser. The plaintiffs then demanded the deposit from the defendants, who claimed to retain out of it their commission upon the scale commission. The trial judge, Mathew J., held that the vendors were willing to carry out the contract but could not do so and acted reasonably in rescinding under the condition, and that therefore the defendants were not entitled to damages by reason of the

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(1) 4 Times L. R. 541.

(2) 10 Times L. R. 76.

(3) 1 C. B. (N. S.) 296.

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(1) 1 C. B. (N. S.) 307.

(2) 4 Times L. R. 541.

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vendors' preventing them from earning their commission. The Court of Appeal, consisting of Lord Esher M.R. and Lindley and Bowen L.JJ., dismissed the appeal. They held first upon the true construction of the contract that the commission was payable only upon a completed sale, that is, when the contract to sell was perfected by conveyance and payment of the purchase money, or, at any rate, when the purchaser became under a liability to pay the purchase money. I pause here to say that in that respect I have taken the same view of the present agreement. The Court then proceeded to consider whether the defendants could recover on the ground that the plaintiffs had made default or on a promise by the plaintiffs not to do any wrongful act to prevent the defendants from carrying out and earning the commission. The judgment of Lindley L.J. seems to me to show what was really decided. He observed, according to the report: "The meaning of the contract was that if a sale were effected commission should be payable; if there was an abortive sale commission should not be payable. The circumstances were that the vendors' solicitors prepared the conditions of sale and the auctioneers sold the property upon those conditions. The auctioneers could only claim commission under this contract if they obtained a sale subject to those conditions. The fourth condition empowered the vendors to rescind the contract of sale in certain events. Could there be an implied contract not to rescind and that the vendors would pay commission if they put an end to the contract of sale under that condition? It was impossible to imply it. Moreover, the real truth was, that the purchaser declined to complete. It was also said that there was an implied contract to pay commission if the vendors were unable to complete the sale. In his opinion the vendor did not warrant to the auctioneer that he had a title to sell which he could force upon a purchaser. Therefore, Mathew J. was right in giving judgment for the amount payable in the event of there being no sale." There is nothing in the rather brief report of this case which leads to the conclusion that the plaintiffs were entitled at their will and pleasure to refuse to carry out the contract with the purchaser,

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and indeed if that had been so the judgments might have been framed in a much more simple manner. It was a case in which there was a just excuse for a step which prevented the agent from earning his commission.

I have already referred to *Lott* v. *Outhwaite*. (1) That case came before the Court of Appeal, and Lindley L.J. observed that in order to entitle the agent to his commission he must prove either that the purchase had been completed, for that was necessary under the terms of the agreement between plaintiff and defendant, or that, if it had not, the non-completion was due to the default of the vendor. I regard this as a clear statement that if the only reason why the commission was not earned was the default of the defendant the latter would be liable in damages.

There is another case in the Court of Appeal on a similar subject, that of *Nosotti* v. *Auerbach*. (2) It was an action brought to recover commission alleged to have been earned by the plaintiff, a house agent, upon the sale of a lease, or, alternatively, damages for preventing the plaintiff from earning the commission. The defendant had instructed the plaintiff to find a purchaser of the leasehold interest for 4000*l*., and the plaintiff did find a Mrs. Singleton who offered 4000*l*. and who required to have possession not later than March 15. The defendant, however, refused to give up possession in March, but offered possession at the end of the London season, and on this the purchase naturally went off. The learned trial judge gave judgment for the plaintiff, being of opinion that there was an implied term in the contract of employment that the defendant would give up possession of the house within a reasonable time. The Court of Appeal, consisting of A. L. Smith, Chitty and Collins L.JJ., dismissed the appeal. They came to the same conclusion that March 15 was a reasonable time to give up possession in the circumstances, and in answer to the question whether the plaintiff had found a purchaser ready and willing to buy the leasehold interest in the house according to the mandate given by the defendant to the plaintiff, they held that he had done so. The negotiations with the purchaser were broken off for one reason only—namely, because the defendant imposed upon the purchaser a term which as between the plaintiff and the defendant was inconsistent with the terms of the original employment. This case, again, is not fully reported, and it is not quite plain whether the plaintiff was held to have recovered the amount of the commission, as such, or whether he was entitled in the alternative to damages for preventing the plaintiff from earning the commission ; but I think it was the latter, for Mrs. Singleton did not turn out in the event to be a "purchaser," and she never, so far as the report shows, entered into a binding contract to purchase the property. To my mind, this case is a strong authority in support of the plaintiffs in the present case. I do not think it is consistent with the terms of employment by the defendants that they were to be at liberty, after the plaintiffs had done everything they could do to earn their commission, to change their mind without cause or reason and thus to deprive the plaintiffs of their remuneration.

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(1) 10 Times L. R. 76.

(2) 15 Times L. R. 140.

There are several other cases on the same subject which have been decided by judges of first instance, but unfortunately they have been imperfectly reported and they are exceedingly difficult to reconcile on the available materials. At any rate no clear principle emerges from them applicable to the present case.

It does not seem to me to be necessary to determine whether the right of the plaintiff is based on a quantum meruit or on the breach of an implied term in the contract. This seems to me mainly a question of nomenclature. Nor do I think it necessary to consider such cases as *Rhodes* v. *Forwood* (1) and *Lazarus* v. *Cairn Line* (2), authorities which I think have been properly distinguished by Greer L.J. In taking the view I have as to the implied term contained in the contract between the plaintiffs and the defendants I quite agree that the implication can only properly be made if the term is a necessary one and that it is not enough to say that it is reasonable. No one would venture to throw any doubt on that almost too well established principle.

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(1) 1 App. Cas. 256.

(2) 17 Com. Cas. 107.

In my opinion the defendants, without just excuse, have broken the implied term of the contract of employment, and there seems to be no reason for doubting in the circumstances that the proper measure of damages is the amount of the commission according to the scale. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellants : *Swepstone, Stone, Barber & Ellis.*

Solicitors for respondents : *Trollope, Winckworth, Crump & Sprott.*

J. S. H.

In re A SOLICITOR.

1934
July 24.

Solicitor—Complaint to disciplinary committee—Finding of " no professional misconduct "—No order made—Appeal by complainant—Whether competent—Preliminary objection—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, c. 37), *s.* 5, *sub-ss.* 1 *and* 2 ; *s.* 7, *sub-ss.* 1 *and* 2 ; *s.* 8.

A complaint was made on behalf of the Law Society to the disciplinary committee appointed under s. 4 of the Solicitors Act, 1932, asking that a solicitor might be required to answer allegations contained in an affidavit. After hearing evidence the committee promulgated their " findings and order," setting out their findings of fact and ending with the words " while not finding any professional misconduct the committee make no order as to costs."

The complainant, on behalf of the Law Society, appealed :—

Held, on a preliminary objection by the respondent, that no appeal lay except from an " order " of the committee. There was no appeal from the " findings " with which the order was required to be prefaced, and the committee had made no order.

But even if the finding that there was no professional misconduct did amount (as the Court held that it did not) to an order dismissing the complaint, the words of s. 8 of the Solicitors Act, 1932, giving a right of appeal to the applicant were not so definite as to override the long-established principle that there could be no appeal against an acquittal. The right contemplated by the section must be limited to cases where an order, which the applicant deemed inadequate, had been made against the solicitor.

Reg. v. *Keepers of the Peace and Justices of the County of London* (1890) 25 Q. B. D. 357 applied.

APPEAL from the disciplinary committee appointed under s. 4 of the Solicitors Act, 1932.

A complaint was made to the disciplinary committee on behalf of the Law Society (1) asking that a solicitor might be required to answer allegations contained in an affidavit, and that his name might be struck off the roll of solicitors of the Supreme Court, or that he might be suspended from practice as a solicitor, or that such other order might be made as the committee should think right.

The committee heard evidence on the matter, and in due course issued a document headed "Findings and Order of the Disciplinary Committee, constituted under the Solicitors Act, 1932." They set out in detail their findings of fact, and concluded with the words "while not finding any professional misconduct the committee make no order as to costs."

The complainant, on behalf of the Law Society, appealed.

Hilbery K.C. and *Eagle* for the respondent. We take a preliminary objection in law. The only appeal given by s. 8 of the Solicitors Act, 1932, is an appeal against an "order" of the committee exercising its disciplinary jurisdiction. No appeal is given against the "findings" of the committee, which may lead to an "order," but which, in the Act itself, are clearly distinguished from the order.

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(1) The Solicitors Act, 1932, provides:

Sect. 5, sub-s. 1: "Any application . . . . (*b*) by another person to strike the name of a solicitor off the roll, or to require a solicitor to answer allegations contained in an affidavit, shall be made to and heard by the Committee in accordance with rules made under the next succeeding section: . . . .

Sub-s. 2: On the hearing of any such application the Committee shall have power to make any such order as to removing from or striking off the roll the name of the solicitor to whom the application relates, as to suspending him from practice, as to the payment by any party of costs, and otherwise in relation to the case as they may think fit: . . . .

Sect. 7, sub-s. 1: Every order made by the Committee under this Part of this Act shall be prefaced by a statement of their findings in relation to the facts of the case and shall be signed by their Chairman and filed with the registrar, and as soon as it has been so filed shall be acted upon by the registrar and be enforceable in the same manner as a judgment or order of the High Court to the like effect.

Sub-s. 2: Where by any such order as aforesaid the name of any solicitor is ordered to be removed from, or struck off, the roll, or any solicitor is suspended from practice, the registrar shall forthwith upon the filing of the order cause a notice stating the effect of the operative part thereof to be published in the London Gazette.

Sect. 8: An appeal against any order made by the Committee under this Part of this Act shall lie to the High Court at the instance either of the applicant or of the solicitor to whom the application relates. . . . ."

In the present case, the "findings" acquit the solicitor of professional misconduct, and the committee deliberately refrained from making any order at all. The Law Society, by their agent, were prosecutors before a committee of their own Council, and seek to appeal from its decision. It is the first time that such a right has been contended for.

The Solicitors Act, 1932, re-enacts the Solicitors Act, 1919, in this respect. Before that the committee reported to the Court with a view to disciplinary action by the Court. But if the committee came to the conclusion that there was no misconduct, there was no report to the Court, and the complainant could not bring the matter before the Court. The new legislation has empowered the committee to take action itself, but has not given a right to appeal against an acquittal. The right given to the applicant is to appeal against an order, e.g., if the committee, finding misconduct proved, impose a penalty which the applicant thinks inadequate to the offence.

The principle of *Reg.* v. *Keepers of the Peace and Justices of the County of London* (1) applies to this case.

Oliver K.C. and *W. M. Andrew* for the Law Society. Although the Law Society was the prosecutor before the disciplinary committee, that committee takes no part in the general duties of the Council of the Law Society, and is entirely distinct from the professional purposes committee.

Sect. 8 in terms gives an appeal to the applicant as well as the respondent, and this appeal, if it is heard, is intended to raise a question of law; not to dispute the committee's findings of fact, but to say that, given those facts, they should have held that professional misconduct was proved. It is submitted that there is an "order" implicit in the findings—and indeed the document containing them is called "findings and order"—namely, an order that the complaint be

(1) 25 Q. B. D. 357.

dismissed. A refusal to make an order may be an order sufficient to support an appeal: see *Ex parte Gillibrand. In re Walker* (1); *Overseers of Walsall* v. *L. & N. W. Ry.* (2) The decision of Clauson J. in *In the Matter of an Application for Discharge of a Restriction affecting* 108, *Lancaster Gate* (3), though at first sight it appears to be against us, was based on the narrow wording of s. 84 of the Law of Property Act, 1925.

LORD HEWART C.J. In my opinion, this objection ought to succeed. The course of recent legislation on this matter, culminating in the Solicitors Act, 1932, is quite clear. Its object is to make the great profession of solicitors masters in their own house, and it is only in limited cases that in circumstances like those before us there is an appeal. I need not refer again to the Solicitors Act of 1888 or to that of 1919, but if it had been intended that there should be an appeal to the High Court, not merely against an order made by the committee under the First Part of the Solicitors Act, 1932, but also against any findings of the committee, nothing would have been easier than to say so. What, on the other hand, is found is a clear contrast pointed again and again between an order made by the committee and findings in relation to the facts of the case by which such an order is to be prefaced. Again and again in the sections and sub-sections to which our attention has been directed, the word "order" appears by way of contrast with the word "findings." The nature of the orders which can be made is set out in s. 5, sub-s. 2. In like manner, by s. 8 of the Act of 1932, it is provided that an appeal against any order shall lie to the High Court, and the Rules made under that section (4) are careful to observe the same terminology: that which may be the subject of an appeal is an "order." The words used by Lord Coleridge C.J. in *Reg.* v. *Keepers of the Peace and Justices of the County of London* (5) are very much in point:

(1) (1884) W. N. 159.
(2) (1878) 4 App. Cas. 30.
(3) [1933] Ch. 419.
(4) The Solicitors Act (Disciplinary) Rules, 1932 (S. R. & O. 1932, No. 983/L. 35).
(5) 25 Q. B. D. 357, 360.

"Our decision must be governed by broad and well-recognised principles of construction. One of those is, that a man acquitted is not to be again proceeded against with respect to the same matter; another principle is that an appeal is never given except by statute." Each of these principles seems to me to apply with great force to the present case. Here, the very experienced committee of the Law Society have deliberately refrained from making an order, and they have said that while not finding any professional misconduct they will make no order as to costs. But not as to costs is an appeal sought. Appeal is sought as to findings of the committee, and in my opinion, without citing other authorities, as one might, it is quite clear that an appeal of that nature is not given under this statute, and the preliminary objection therefore succeeds, with the result that this appeal must be dismissed.

Avory J. I am of the same opinion. To my mind, the question for the Court really is whether the words of s. 8 of the Act of 1932 are so plain in favour of the present applicant's contention that they destroy the recognized principle that no appeal lies from an acquittal, a principle to which my Lord has referred and which was laid down in *Reg.* v. *Keepers of the Peace and Justices of the County of London.* (1)

It is quite true that s. 8 in terms gives a right of appeal to the applicant. In this case the applicant was the Law Society itself. Although the position is unusual, I am not prepared to say that the Law Society may not be an applicant within the meaning of the Act against a solicitor, nor am I prepared to say that the Law Society may not be an appellant against an order of the disciplinary committee. The question is whether it can be an appellant against a refusal of the disciplinary committee to make any order; in other words, whether it can be an appellant against an acquittal by the disciplinary committee of a charge of misconduct which is made against a solicitor.

(1) 25 Q. B. D. 357.

For the purpose of determining whether the Law Society can be an appellant against a refusal to make any order, I think it is material to look at s. 5, sub-s. 2, of the Act of 1932, and also at s. 7, in order to see what is the nature of the order which it is contemplated may be the subject of an appeal. Sect. 5, sub-s. 2, provides that "on the hearing of any such application the Committee shall have power to make any such order as to removing from or striking off the roll the name of the solicitor to whom the application relates, as to suspending him from practice, as to the payment by any party of costs, and otherwise in relation to the case as they may think fit." I do not agree that the words "otherwise in relation to the case" mean a refusal to make an order at all. Further, s. 7 provides that every order made by the committee shall be prefaced by a statement of their findings "and filed with the registrar, and as soon as it has been so filed shall be acted upon by the registrar and be enforceable in the same manner as a judgment or order of the High Court to the like effect." How can an acquittal of an accused person be acted upon in the same manner as a judgment of the High Court? It seems to me impossible. Therefore, in my view, the word "order" throughout the Act does contemplate some definite order made against a solicitor, either striking him off the roll or suspending him from practice or making some order against him to his detriment. Therefore, the words of s. 7, sub-s. 2, are only intended to operate in a case where the committee has, for example, made an order merely suspending a solicitor and the applicant thinks that the offences committed are so grave that the solicitor should be struck off the roll or at least suspended for a longer time, in which case there may be a right of appeal. I therefore agree that this preliminary objection succeeds.

Swift J. There is said here to be an appeal under s. 8 of the Solicitors Act, 1932. There is a preliminary point that in fact no order was made by the committee. Now, it is clear and long-established law that appeal is the creature of statute. There is no appeal from one tribunal to another tribunal unless some statute gives the right to it. Is there any statute giving a right to appeal to the High Court from the findings of the disciplinary committee which deals with these matters ?

The Act of 1932 makes it quite plain that there is no appeal from anything except an order, and unless there is an order there can be no appeal. In this case I am satisfied that there was no order. The committee made no order because they came to the conclusion that they should make no order. They might have made an order striking the solicitor off the roll, or suspending him from practice, or subjecting him to various penalties under different sections of the Act. But they did nothing of the kind and left nothing on which there could be an appeal.

But assuming that there was an order, it was an order acquitting a solicitor of charges against him, and I am quite satisfied on the authority of *Reg.* v. *Keepers of the Peace and Justices of the County of London* (1) that unless there is distinct statutory authority for saying there can be an appeal against an acquittal of some one charged with a crime such a right does not exist. It should be a delight to every one to know that a person who has been charged and found innocent by the proper tribunal is not guilty. He cannot be taken on to another court and vexed again for the same alleged offence. I therefore agree that this preliminary objection ought to succeed.

Preliminary objection upheld ; appeal dismissed.

Solicitors for the Law Society : *C. O. Humphreys & Son.* (2)

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(1) 25 Q. B. D. 357.

(2) As the proceedings resulted in the acquittal of the respondent solicitor, his name, in accordance with the usual practice, was not divulged.

J. W. H.

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May 4, 11.

LIPTON, LIMITED *v.* SHOREDITCH ASSESSMENT COMMITTEE.

Rates—Derating—Valuation list—Hereditament not included in special list as industrial hereditament—Objection by Occupier disallowed by assessment committee and by Quarter Sessions—New quinquennial list including hereditament as non-industrial—Decision of High Court that hereditament be inserted in special list as industrial—Supplemental list not referring to hereditament—No claim by Occupier before deposit of that list that hereditament be treated therein as industrial—Subsequent claim to that effect and Notice of Objection to that list—Sufficiency of claim—Whether alteration in quinquennial list during twelve months preceding supplemental list—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 46, 47—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 70, *sub-s.* 4.

A claim under the Local Government Act, 1929, s. 70, sub-s. 4, by the occupier of a hereditament to the rating authority that it should be treated as an industrial hereditament for the purposes of a valuation list, though made after the rating authority has deposited the list and at the time when notice of objection to the list is given by the occupier to the assessment committee, is not invalid as having been made too late.

An objection by the occupier of a hereditament in a Metropolitan borough to its non-inclusion in a special valuation list as an industrial hereditament assessable as such at a quarter only of its net annual value, was disallowed by the assessment committee, and their decision was affirmed by quarter sessions, subject to an appeal to the High Court by case stated. In these circumstances a quinquennial list for the borough came into force in which the hereditament was entered as a non-industrial hereditament assessable at its full net annual value. In the course of the twelve months preceding the making of a subsequent supplemental list the High Court determined on the case stated that the hereditament was an industrial hereditament, and quarter sessions accordingly made an order that it should be inserted as such in the special list; and the decision of the High Court was affirmed by the Court of Appeal. In the supplemental list when deposited the hereditament was not included or referred to:—

Held, that the decisions of the High Court and the Court of Appeal and the order of quarter sessions effected, within the meaning of the Valuation (Metropolis) Act, 1869, s. 46, "alterations" in matters stated in the quinquennial list—namely, alterations in the statements therein that the hereditament was a non-industrial hereditament and rateable as such; and that the hereditament should be inserted in the supplemental list as an industrial hereditament and its rateable value reduced accordingly.

Special Case stated by the court of quarter sessions for the county of London.

Messrs. Liptons, Ld., were the occupiers of a hereditament, No. 112/122 Tabernacle Street, in the metropolitan borough of Shoreditch, the basement of which was used by them as a tin box factory and the remainder for tea milling, blending, and packing. The hereditament was not included in the special list made in 1929 for the rating area of the borough for the purposes of the Rating and Valuation (Apportionment) Act, 1928, and the occupiers objected before the assessment committee of the borough against its omission, the ground of their objection being that it was an industrial hereditament within the meaning of that Act. The assessment committee disallowed the objection, and in November, 1929, an appeal, to which they were not parties, from their decision was dismissed by the above mentioned court of quarter sessions subject, however, to a special case. In the quinquennial valuation list for the borough which was made on May 24, 1930, and came into force on April 6, 1931, the hereditament was accordingly entered in Part I. as not being an industrial or freight transport hereditament within the Act of 1928, and it was assessed for the purposes of the Valuation (Metropolis) Acts, 1869 to 1929, at 2200*l.* as the gross value thereof and at 1830*l.* as the net annual value thereof, and at the last mentioned sum as the total rateable value thereof.

During the twelve months following the coming into force of that quinquennial list, to wit, on April 23, 1931, the High Court upon the special case last above mentioned determined that the hereditament was an industrial hereditament within the Act of 1928 and ordered that the decision of quarter sessions of November 15, 1929, should be reversed and that the hereditament should be included in the special list; and the court of quarter sessions thereupon, on April 29, 1931, ordered that the special list should be amended by inserting the hereditament therein as an industrial hereditament; and on June 9, 1931, an appeal from the decision of the High Court was dismissed by the Court of Appeal. On April 23, 1932, the council of the borough as rating authority, under s. 46 of the Valuation (Metropolis) Act, 1869, duly made and deposited a supplemental valuation list to come into force on

April 6, 1933, in which list the said hereditament was not included or referred to. The occupiers did not at any time before the council had deposited that list make any claim to the council under s. 70, sub-s. 4, of the Local Government Act, 1929, that the hereditament ought to be treated as an industrial hereditament for the purposes of that list. On May 13, 1932, however, the occupiers sent to the council acting as the rating authority a formal claim under that section that the hereditament ought to be treated as an industrial hereditament for the purposes of the supplemental list, and also on the same date gave notice of objection to that list. On September 6, 1932, the occupiers appeared in support of their objection, but the assessment committee refused to alter the supplemental list by including the hereditament in Part II. thereof as an industrial hereditament. The occupiers appealed to the court of quarter sessions.

The contentions of the occupiers as stated in para. 3 of the special case were :—

(*a*) That the decision of the court of quarter sessions given on November 15, 1929, to the effect that the hereditament was not an industrial hereditament, was binding upon the occupiers and upon the assessment committee and upon the council acting as the rating authority at all material times down to April 23, 1931, when it was reversed by the High Court as aforesaid.

(*b*) That accordingly at all material times from May 24, 1930, when the quinquennial valuation list was made, down to April 6, 1931, when that list came into force, the hereditament was conclusively deemed not to be an industrial hereditament, and that it was not open to the council or to the assessment committee to treat it as an industrial hereditament for the purposes of the valuation list and that it was rightly entered in Part I. of the valuation list as not being an industrial or freight-transport hereditament.

(*c*) That the decisions of the High Court given on April 23, 1931, and of the Court of Appeal given on June 9, 1931, and the consequent order made by the court of quarter sessions as aforesaid were binding upon the council and upon the assessment committee and effected an alteration in certain matters stated in the quinquennial valuation list during the twelve months preceding the making of the supplemental list within the meaning of s. 46, sub-s. 1, of the Act of 1869—namely, an alteration in the statements that no part of the hereditament was to be treated as an industrial hereditament and that the net annual value thereof was accordingly to be taken to be the total rateable value thereof.

(*d*) That in consequence of these decisions and of the order of the court of quarter sessions it became and was the duty of the council and/or of the assessment committee under s. 46, sub-s. 1, of the Act of 1869, and s. 1, sub-s. 1, and s. 4 of the Act of 1928 to insert the hereditament in Part II. of the supplemental list as an industrial hereditament and to reduce the total rateable value thereof accordingly.

(*e*) That the supplemental list ought therefore to be amended so as to include the hereditament as an industrial hereditament with the following assessments: gross value 2200*l.*; net annual value 1830*l.*; total rateable value 457*l.*

The contentions of the assessment committee as stated in para. 4 of the case were:—

(*a*) That inasmuch as the occupiers did not make a claim to the council that the hereditament ought to be treated as an industrial hereditament for the purposes of the supplemental list until after the council had deposited the list, the council and the assessment committee were precluded from treating the hereditament as such for that purpose by the provisions of s. 70, sub-s. 4, of the Act of 1929.

(*b*) That upon the true construction of s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1929, no alteration took place during the twelve months preceding April 6, 1932, in any of the matters stated in the quinquennial valuation list affecting the hereditament.

The court of quarter sessions gave judgment in favour of the occupiers.

The question for the opinion of the High Court was whether upon the above facts there was evidence upon which the court of quarter sessions could so decide in law.

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Hubert Hull, for the assessment committee, appellants. The decision of the court of quarter sessions that the occupiers' hereditament should be treated as an industrial hereditament and included as such in the supplemental list was wrong and should be reversed.

First, that decision was wrong, because the occupiers did not make a claim to the rating authority under the Local Government Act, 1929, s. 70, sub-s. 4 (1), that the hereditament ought to be so treated until after that authority had made and deposited the supplemental list. It cannot be supposed that there is no limit of time within which a claim under the sub-section must be made. There is no statutory provision which gives the rating authority of their own motion power to alter a valuation list after it has been deposited, and that being so, a claim under the sub-section that a hereditament should be included in the list as an industrial hereditament cannot properly be made to the rating authority unless it is made before they have deposited the list: see *Stepney Borough Council* v. *John Walker & Sons, Ld.* (2) As the occupiers made no claim to the rating authority before the supplemental list was deposited to have the hereditament included in it as an industrial hereditament, they failed to fulfil a condition precedent to the hereditament being so included. The claim which the occupiers sent to the rating authority after that list had been deposited, along with their notice of objection to the assessment committee, was sent too late. The rating authority had then no power to insert the hereditament in the list as an industrial hereditament, and the assessment committee rightly refused to entertain the occupiers' objection to the list and to alter the list by including in it the hereditament as an industrial hereditament. It was the intention of the Legislature that the occupier of a hereditament should experience some difficulty in procuring its inclusion in the privileged class of industrial hereditaments, and should be required to make his claim as early as possible, inasmuch as, if the hereditament is treated as industrial and its rateable value reduced accordingly, the rates of the other ratepayers will be increased.

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(1) The terms of the sub-section are set out in the judgment of the Lord Chief Justice, p. 480 below.

(2) [1934] A. C. 365, H. L. reversing [1933] 2 K. B. 273.

Secondly, the decision of the quarter sessions was wrong, because no "alterations" within the meaning of the Valuation (Metropolis) Act, 1869, s. 46, sub-s. 1 (1), took place during the twelve months preceding April 6, 1932, in any of the matters stated in the quinquennial list affecting the hereditament. In order to constitute an alteration of a hereditament under the sub-section it must be proved not only that there has been an alteration in the value of the hereditament, but that it is due to a change in the circumstances directly affecting the particular hereditament : *Camberwell Assessment Committee* v. *Ellis*. (2) The Local Government Act, 1929, s. 70, sub-s. 1, in specifying the grounds on which the quinquennial list may be altered by a provisional list, mentions the fact of a hereditament having in the course of a year "become or ceased to be an . . . . industrial . . . . hereditament." There was here no change in the circumstances affecting the hereditament during the material period of twelve months. All that happened was that the High Court and the Court of Appeal declared that the hereditament was an industrial hereditament and that the court of quarter sessions ordered that it should be inserted in the special list as such. These decisions of the Courts did not alter the character of the hereditament, but merely declared it. They affirmed the fact that the hereditament had all along been an industrial hereditament. It was an industrial hereditament from the first, and the decisions of the Courts added no circumstance to it and effected no change in it. The fact that it was an industrial hereditament should have been known to every person and authority concerned. To discover errors in a valuation list is not to effect "alterations" in matters stated in it within s. 46, sub-s. 1, of the Act of 1869.

C. P. Harvey, for the occupiers, respondents. The decision of the court of quarter sessions was right on both points.

First, the claim of the occupiers that the hereditament

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(1) See p. 482 below.

(2) [1900] 1 Q. B. 68, affirmed [1900] A. C. 510.

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should be treated as an industrial hereditament for the purposes of the supplemental list was not made too late to be effective. The claim was made under the Local Government Act, 1929, s. 70, sub-s. 4, which provides that no hereditament shall, for the purposes of any valuation list, be treated as an industrial hereditament (unless as therein mentioned) except upon a claim that it ought to be so treated being made to the rating authority. The meaning of that sub-section, as of other enactments, can only be ascertained from the express provision or necessary implication of the enactment itself, and it is not permissible to add to or take from its terms : see *Salomon* v. *Salomon & Co.* (1) The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the Act : *Vacher & Sons, Ld.* v. *London Society of Compositors.* (2) Sect. 70, sub-s. 4, when construed according to these rules, does not impose any limit of time within which the claim must be made except that it must be made before the hereditament can be treated as industrial. Neither the sub-section itself nor any other provision specifies any further limit of time. The sub-section does not provide either expressly or by implication that the claim must be made to the rating authority before they make and deposit the list. The power of the rating authority extends only to formulating a list and not to dealing with claims. The London (Valuation Lists) Regulations, 1929, reg. 8 (3.), provides that a claim of this kind shall be in the appropriate form set out in the Schedule thereto ; but in neither the regulation nor the form is it stated that the claim must be made within any limited time. It would be difficult to fix a limit of time which would conform to the various statutory provisions, and suit the requirements of all parties ; and the inconvenience of having a limit would be greater than that of having none. The making of a claim under the sub-section is merely a condition precedent to the assessment committee considering the list, and the occupier is entitled to make his claim at any time before the list comes before the committee. Under the older Acts it would seem that the ratepayer could make a claim or objection of this kind at any time before the final approval of the list. The Union Assessment Committee Act, 1862 (25 & 26 Vict., c. 103) (now repealed), provided (s. 17) that the valuation list should be deposited by the overseers, who should give notice of the deposit and fourteen days afterwards transmit the list to the assessment committee ; (s. 18) that any person aggrieved by the list on the ground of unfairness or incorrectness in the valuation of any hereditaments or of the omission of any hereditament might at any time after the deposit of the list and within twenty-eight days after the notice thereof give to the committee notice of objection ; (s. 19) that the committee were to hear the objections, and (s. 20) to correct and approve the list ; and (s. 25) that where it should appear to the overseers that any rateable property included in the list had been increased or reduced in value by alteration in the condition thereof or otherwise the overseers should make a supplemental valuation list showing the value of the property. The Valuation (Metropolis) Act, 1869, which incorporates the last mentioned Act, provides (s. 6) that the overseers of every parish within the time in the Act specified should make and sign a valuation list ; (s. 7) that after the list is signed by the overseers the same proceedings shall be had as are directed by ss. 17 to 21 of the Act of 1862 ; (s. 42) that the overseers shall (i.) make and deposit the valuation list before June 1, and (ii.) transmit the list to the assessment committee from fourteen to seventeen days after notice of the deposit of the list ; (s. 43) that the list as approved by the assessment committee shall come into force on April 6 next after it is made and shall last for five years, subject to alterations by any supplemental or provisional list ; and (s. 46, sub-s. 3) that the same regulations shall be observed and the same proceedings had in the case of a supplemental list as in the case of the quinquennial list. These sections seem to provide in effect that the ratepayer can make a claim or objection at any time before the list is approved by the assessment committee. Here the occupiers made their claim in May, 1932, more than three months before the meeting of the assessment committee in September, 1932, and more than ten months before the supplemental list came into force in April, 1933. It cannot be supposed that s. 70, sub-s. 4, of the Act of 1929, which contains no express provision to that effect, prevents a claim from being made under these earlier Acts unless it is made before the list is deposited by the rating authority. In *Stepney Borough Council* v. *John Walker & Sons, Ld.* (1) no claim appears to have been made to the rating authority in the prescribed form.

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(1) [1897] A. C. 22, 29, 38.

(2) [1913] A. C. 107, 117.

Secondly, on the true construction of the Valuation (Metropolis) Act, 1869, s. 46, sub-s. 1, alterations took place in matters stated in the quinquennial list affecting the hereditament which ought to be shown in the supplemental list. The quinquennial list which came into force on April 6, 1931, stated that the occupiers' hereditament was not to be treated as an industrial hereditament, and that its net annual value was to be taken to be its total rateable value. The decisions of the High Court and of the Court of Appeal that the hereditament was an industrial hereditament, and the order of quarter sessions that it should be inserted in the list as such, effected alterations in the said matters stated in the quinquennial list which affected the hereditament. These alterations took place during the twelve months preceding the making and deposit of the supplemental list, and they ought therefore to be shown in that list. An alteration in the matter affecting the hereditament need not be an alteration in the hereditament itself, but may be due to a change in its circumstances: see Ryde on Rating, 6th ed., pp. 790, 791. A statement by Lord Hanworth M.R. in *Rex* v. *Stepney Borough Council. Ex parte Walker & Sons, Ld.* (2), which might seem to imply that an actual alteration of the premises is necessary was only an obiter dictum. Even if an alteration in the premises is necessary, an alteration of that sort must be deemed to have taken place here. When the quinquennial list came into effect it must be taken that it was correct in all respects and that the premises

(1) [1934] A. C. 365, H. L. reversing [1933] 2 K. B. 273 C. A.

(2) [1933] 2 K. B. 273, 278; reversed in H. L. [1934] A. C. 365.

were at that time non-industrial. The decisions of the Courts in declaring them to be industrial must therefore be taken to have effected an alteration in the premises. There is a difference in scope between s. 46, which provides for the supplemental list, and s. 47, which provides for the provisional list. The latter section deals with any actual increase or reduction in the value of the hereditament in the course of the year; but s. 46 deals with any alteration during the year in any matter stated in the existing list which affects the hereditament: see *Reg.* v. *New River Co.* (3) and *Ellis* v. *Camberwell Assessment Committee.* (4)

Hubert Hull replied.

Cur. adv. vult.

May 11. LORD HEWART C.J. This is a special case stated by the court of quarter sessions for the county of London. The assessment committee of the metropolitan borough of Shoreditch, who at quarter sessions were the respondents, are the present appellants, and Messrs. Lipton, Ld., the occupiers of a hereditament in that borough, who were the appellants at quarter sessions, are the present respondents. The questions to which the case gives rise are by no means free from difficulty or doubt, and they have been, if I may say so, extremely well argued on both sides.

The matter arises in the following way. [His Lordship stated the facts and the contentions of the parties substantially as above set out, and continued as follows:] Having those facts and those contentions before them, the court of quarter sessions gave judgment in favour of the occupiers, and it is from that judgment that the assessment committee, by means of the special case, have appealed to this Court.

The first question to be considered, as it seems to me, is whether the assessment committee are right in their contention that as the occupiers did not make a claim to the council that the hereditament ought to be treated as an industrial hereditament for the purposes of the supplemental list until after the council had deposited the list, the council and the assessment committee were precluded from treating the hereditament as

(1) (1879) 4 Q. B. D. 309, 312. (2) [1900] 1 Q. B. 68, 74; [1900] A. C. 510.

such by the provisions of s. 70, sub-s. 4, of the Local Government Act, 1929. That sub-section is in these terms: "Notwithstanding anything in the Rating and Valuation (Apportionment) Act, 1928, no hereditament shall, for the purposes of any valuation list which will come into force after the appointed day, be treated as an agricultural, industrial or freight transport hereditament unless it was so treated for the purposes of the last preceding valuation list except upon a claim that it ought to be so treated being made to the rating authority by the owner or occupier of the hereditament in the prescribed form, which shall be supplied by the rating authority on the demand of the owner or occupier of any hereditament in their area." It is to be observed, I think, in the first place that no valuation list is effective until it has been approved by the assessment committee. For authority in support of that proposition reference may be made to the case of *Parrish* v. *Mayor of Hackney*. (1) The headnote to that case begins: "A valuation list is not 'made' within the meaning of s. 47, sub-s. 8, of the Valuation (Metropolis) Act, 1869, which provides that a provisional list shall continue in force 'until the first list (supplemental or other) which is subsequently made comes into force,' until it is finally approved by the assessment committee"; and Buckley L.J., as he then was, in delivering judgment in the Court of Appeal, said (2): "The act of the overseers in making and signing the list is an act of relatively small importance; it is an act which can be done at any date not later than May 31, and it is an act which can be reviewed and altered under all the provisions of the Act. The list made by the overseers never necessarily comes into force at all. That which comes into force is the list initiated by the overseers by making and signing it, and which after review is finally approved and sent to the overseers under s. 42, sub-s. 8. In the present case the quinquennial list was, I think, made within the meaning of the word 'made' in s. 47, sub-s. 8, not on May 30, when the overseers signed it, but on October 31 when it had assumed its final form, and the assessment committee finally approved it." It is to be observed that in s. 70, sub-s. 4, of the Local Government Act, 1929, no precise time is stated at which, or before which, the claim therein referred to, that the hereditament shall be treated as an industrial hereditament, must be made to the rating authority. The contention of the assessment committee is that the claim must be made, if it is to be of any effect, before the list is deposited. There are no such words in the sub-section. Further, the fact is here found that upon the day on which notice of objection to the list was given to the assessment committee, a formal claim under s. 70, sub-s. 4, was made to the rating authority. In other words, it was quite clear that the rating authority had notice of the claim and of the objection. This sub-s. 4 of s. 70 seems to be evidently of wider scope than sub-s. 1 of that section. Sect. 70, sub-s. 1, provides that: "As from the appointed day, the fact of any hereditament in the County of London having in the course of any year become or ceased to be an agricultural, industrial or freight transport hereditament shall, for the purposes of section forty-seven of the Valuation (Metropolis) Act, 1869, be a ground for making and sending to the assessment committee a provisional list," and so forth. Stress was laid, and naturally laid, in the argument upon those words "having . . . . become or ceased to be." The words of s. 70, sub-s. 4, however, are not "no such hereditament shall . . . . be treated," etc., but are quite general: "no hereditament shall be treated." I have come to the conclusion, though I confess not without hesitation, that the argument advanced here by the occupiers is correct, and that s. 70, sub-s. 4, did not make the objection to the assessment committee out of time; or, to put the result in another way, that there was not here any failure to fulfil a condition precedent to the hereditament being treated as an industrial hereditament. I think, therefore, that the first and more brief contention so ably argued by Mr. Hull on the part of the assessment committee fails.

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(1) [1912] 1 K. B. 669.

(2) Ibid. 669, 680.

The second contention was, and is, that upon the true construction of s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1869, no alteration took place during the twelve months preceding April 6, 1932, in any of the matters stated in the quinquennial valuation list affecting the hereditament. That contention involves a consideration of the words of s. 46 of the Act of 1869. Here also the difficulty of the question raised is apparent, not the less because of the verbal contrast between the opening of s. 46 of that Act and the opening of the next following section, s. 47. But looking at the very words of s. 46, I think, though again I say not without hesitation, that the words are wide enough to include such an alteration as that which here took place. The words are : "Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years (the first of such periods beginning with the 6th of April, 1871) shall be conducted as follows : (1.) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations." Those words seem to me to point to an antithesis between the hereditaments affected on the one hand, and the alterations in any of the matters stated in the valuation list on the other hand. No doubt it is quite true that the decisions of this Court and of the Court of Appeal did not alter this hereditament itself. The hereditament was what it had been—namely, an industrial hereditament. But before those decisions had been given it had not been so regarded, and when those decisions were given, and when the list was accordingly altered, the hereditament which had been stated to be non-industrial was stated as industrial, and there followed automatically a reduction in its rateable value. It seems to me that those were alterations which have taken place during the preceding twelve months in certain of the matters stated in the valuation list, and I think that the contention made on behalf of the Limited Company, and set out in para. 3, sub-para. (*c*), of this case, was correct. There had been by virtue of what had taken place an alteration in the statement that no part of the hereditament was to be treated as an industrial hereditament, and in the statement that the net annual value thereof was to be taken to be the total rateable value thereof.

Recognising as I do the force of the argument which has been presented to the Court on behalf of the assessment committee, I have arrived at the conclusion that their contentions are not to be supported, and on the other hand, that the conclusion at which the court of quarter sessions arrived was correct. The court of quarter sessions have certainly expressed their conclusion with remarkable brevity. They say in para. 5 of the case: "We gave judgment in favour of the appellants with costs," the appellants being Lipton, Ld., the occupiers. No reasons are given for the judgment, but it must be taken, I think, that in substance the court of quarter sessions accepted the contentions made on behalf of the occupiers and did not accept the contentions made on behalf of the assessment committee. I am not prepared to say that there was not evidence upon which the court of quarter sessions could arrive at that judgment.

The question raised by this case for the opinion of the Court is whether upon the above facts there was evidence upon which the court of quarter sessions could so decide in point of law. I think there was evidence, and I do not think that the court of quarter sessions in point of law misdirected themselves. It follows that in my view this appeal fails, and ought to be dismissed.

AVORY J. I agree that the appeal should be dismissed.

The questions for decision in this case are compendiously indicated in the contentions of the assessment committee before the court of quarter sessions. The first of these questions is whether, inasmuch as the occupiers did not make a claim to the borough council that the hereditament ought to be treated as an industrial hereditament for the purposes of the supplemental list until after the council had deposited the list, the assessment committee were precluded from treating the hereditament as such. The answer to this question depends upon the construction of s. 70, sub-s. 4, of the Local

Government Act, 1929. Although it is true, as my Lord has pointed out, that sub-s. 1 of that section appears to contemplate a hereditament which has become an industrial hereditament in the course of any year, I see no reason for holding that sub-s. 4 is limited to a case where the hereditament has become an industrial hereditament in the year in question. That being so, the only remaining consideration is whether the claim in this case was made consistently and in conformity with the provisions of sub-s. 4. It is said on behalf of the assessment committee that the sub-section ought to be read as meaning that the claim that the hereditament should be so treated must be made before the making and deposit of the list by the rating authority. I see no reason for importing into the sub-section those words, which are not there. The words are " except upon a claim that it ought to be so treated being made to the rating authority," and in my opinion those words are satisfied if the claim is made to the rating authority before the assessment committee consider and determine the question whether the hereditament ought to be so treated.

The second question in the case is whether, upon the true construction of s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1929, an alteration had taken place during the twelve months preceding April 6, 1932, in any of the matters stated in the quinquennial valuation list affecting the hereditament. I agree that this question is more difficult than the first one, but I have come to the conclusion that the general words in s. 46, sub-s. 1—" alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list "—are satisfied in this case by the circumstance that this hereditament had been declared in the preceding twelve months to be an industrial hereditament, with the consequent alteration of its rateable value to one-fourth of the annual value. In support of that view, I think reference may be made to the judgment of Vaughan Williams L.J. in *Ellis* v. *Camberwell Assessment Committee* (1), where, referring to these very words in s. 46, namely, " the matters stated in the valuation list," he says, " which, of

(1) [1900] 1 Q. B. 68, 74; affirmed [1900] A. C. 510.

course, include the gross and rateable value." In determining this question it seems to me to be material to look at the contemporaneous legislation affecting this matter. The Valuation (Metropolis) Act, 1869, by s. 1 incorporates the Union Assessment Committee Act, 1862, and although it is true that that Act has been repealed by the Rating and Valuation Act, 1925, I think it is useful to look at some of the provisions in the Act of 1862 which may throw light upon this question.

I find in s. 18 of the Act of 1862 this provision as to objections to the valuation list: "Any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments . . . . may . . . . give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof." That word "incorrectness" is reproduced in the Rating and Valuation Act, 1925, which provides for objections being made to the valuation list. Sect. 37 of that Act provides that "any person . . . . who is aggrieved by the incorrectness"—that word comes first now—"or unfairness of any matter in the valuation list" may give notice of his objection, etc., or "may make . . . . a proposal for the amendment of the list," is the new form. Then s. 25 of the Act of 1862 provided for the supplemental list in these terms: "When and so often as any property not included in the valuation list in force in any parish becomes rateable, or where, by reason of any alteration in the occupation of any property included in such list, such property becomes liable to be rated in parts not mentioned in such list as rateable hereditaments and separately valued therein, and when and so often as it shall appear to the overseers that any rateable property included in such list has been increased or reduced in value since the valuation thereof" —now come these important words—"whether by building, destruction of building, or other alteration in the condition thereof or otherwise, the overseers of the parish in each of the cases aforesaid shall, as soon as conveniently may be, make a supplemental valuation list shewing the annual rateable value according to the judgment of the overseers of the property." Those words "or otherwise" in that section are clearly wide enough to cover the case in question here. I find also in that Act of 1862 a recognition by the Legislature of some exceptional cases, it being there provided in s. 36: " Nothing herein contained shall extend or be taken to render liable to be rated any property, or any person in respect of any occupation not now by law rateable of any property, or to deprive any property, or the occupier of any property, of the benefit of any exemption, in whole or in part, to which such property or occupier is now by law entitled, from any poor rate or other rate which by law is required to be based upon the poor rate, or to render liable to be rated, according to the annual rateable value thereof, any property which under any Local Act or otherwise is entitled to be rated upon a fixed amount, or according to any special or exceptional principle of valuation." There is thus a recognition in that Act which was incorporated in the Valuation (Metropolis) Act, 1869, that any special or exceptional principle of valuation was to be observed. Although, as I have said, it is true that that Act has been wholly repealed by the Rating and Valuation Act, 1925, it does seem to me material in considering the words in s. 46, sub-s. 1, of the Act of 1869, to see the sense in which they appear to have been understood and construed at the date of the passing of the last mentioned Act. Especially does this seem material in view of the fact that the new statute, the Rating and Valuation Act, 1925, has adopted the word " incorrectness " which obviously is wide enough to include a statement of the rateable value being so much when in fact it ought to be one-fourth of that amount. In my opinion the effect of the decision of this Court, confirmed as it was by the Court of Appeal, in the year preceding the year in which this supplemental list was made, was that the hereditament had become entitled to be rated at one-fourth of its annual value, and therefore that there was such an alteration in the then existing valuation list as brought the case within the provisions of s. 46, and that the assessment committee ought therefore to have made the necessary correction.

On those grounds I agree that this appeal should be dismissed.

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Talbot J. I have come to the same conclusion, and like the other members of the Court I think the solution of the questions which we have to decide is a matter of considerable difficulty. On the whole I am satisfied, for the reasons which my Lord has stated, and to which I desire to add nothing, that no sufficient ground has been shown for holding that the decision of the court of quarter sessions was wrong. I agree, therefore, that our duty is to dismiss the appeal.

Appeal dismissed.

Solicitor for assessment committee, appellants: *R. Cyril Ray, Town Clerk, Shoreditch.*

Solicitor for occupiers, respondents: *T. H. B. Bamford.*

J. R.

SIMMONS *v.* RUSSELL FINANCIERS, LIMITED.

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[1933. S. 2546.]

Moneylender—Loan Transaction by means of Bill of Sale—Bill of Sale in Statutory Form—Payment by Instalments—Equal monthly payments in respect of both Principal and Interest—Bill of Sale set out verbatim in Memorandum—Statement in Memorandum of date of loan, amount of Principal and rate of Interest charged—Number of Instalments payable not stated—Validity of Memorandum—Bills of Sale Act (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 9, *Schedule—Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

A loan was made by registered moneylenders on the security of a bill of sale given by the borrower on his furniture. The transaction was a moneylending transaction within the meaning of the Moneylenders Act, 1927. The memorandum of the transaction stated the date of the loan, the amount of the principal advanced and the rate of interest charged. The bill of sale, which was in the form required by the Schedule to the Bills of Sale Act (1878) Amendment Act, 1882, was also set out verbatim in the memorandum. Under the bill of sale the borrower agreed to pay to the lenders the principal sum advanced together with the interest then due by equal monthly payments of 3*l.* to be paid on a specified date of each month until the whole amount including principal and interest was repaid. Neither the bill of sale nor the memorandum stated the number of instalments that had to be paid. Objection was taken that the contract was unenforceable, as the memorandum did not contain all the terms of the contract because the number of instalments payable had not been stated therein :—

Held, that the contract was enforceable, as the memorandum set out the particulars specifically required by s. 6, sub-s. 2, of the Moneylenders Act, 1927, and also set out verbatim the bill of sale, which was in the statutory form, and accordingly contained all the terms of the contract. What had not been set out was the effect of those terms according to the decisions of the Courts in various cases, but the statute did not require that to be set out in the memorandum.

APPEAL from a decision of Macnaghten J.

The appellants, Russell Financiers, Ld., were registered moneylenders. They made a loan to the plaintiff Simmons on May 22, 1930. The transaction in question was a moneylending transaction within the meaning of the Moneylenders Act, 1927, and the loan was made on the security of furniture charged by a bill of sale. The memorandum of the transaction required by s. 6, sub-s. 1 of the Moneylenders Act, 1927, set out the date of the loan, May 22, 1930, the amount of the principal advanced, 45*l.*, and specified the rate of interest as being 48 per cent. per annum. It contained no provision as to when the loan was to be repaid or when the interest was to be paid. The bill of sale, which was in the statutory form required by the Bills of Sale Act (1878) Amendment Act, 1882, was, however, set out verbatim in the memorandum. By the bill of sale the plaintiff, who was there described as the mortgagor, assigned to the defendants, who were described as mortgagees, the several chattels and things specifically described in the schedule thereto by way of security for the payment of the sum of 45*l.* and interest thereon at the rate of 48 per cent. per annum. The bill of sale also contained the following clause : " And the mortgagor doth further agree and declare that he will duly pay to the mortgagees the principal sum aforesaid, together with the interest then due, by equal monthly payments of 3*l.*, the first of such payments to be made on the twenty-second day of June, 1930, and the like payments to be made on the twenty-second day of each and every succeeding month thereafter until the whole amount, including principal and interest, be repaid."

The plaintiff Simmons brought an action against the defendants claiming a declaration that the transaction was void under s. 6 of the Moneylenders Act, 1927 (1), and that he was under no liability in respect thereof, and alleging various grounds for so holding.

At the trial the plaintiff by his counsel abandoned the various grounds set up in the statement of claim and relied entirely on a preliminary objection not raised on the pleading that the note or memorandum of the transaction did not comply with s. 6 of the Moneylenders Act, 1927 (1), because it did not contain all the terms of the contract, inasmuch as it did not set out the number of payments which had to be made.

MACNAGHTEN J. in the course of his judgment said: "It is said that this stipulation contained in the bill of sale [to repay principal and interest by equal monthly payments of 3*l*.] is to be taken as part of the terms of the loan, which have to be set out in the memorandum provided for by s. 6 of the Moneylenders Act, 1927. I am told that, although the bill of sale does not say how many monthly payments of 3*l*. would

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(1) Moneylenders Act, 1927, s. 6, sub-s. 1: "No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be."

Sub-s. 2: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

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be required to be made by the borrower, twenty-three monthly payments of 3*l.* followed by a twenty-fourth payment of 1*l.* 6*s.* 5*d.* would discharge the obligation of the mortgagor or borrower, and that in truth and in fact the contract of loan which was made was that the lenders would lend 45*l.*, and that the borrower would pay to the lenders twenty-three monthly payments of 3*l.* and on the twenty-fourth month 1*l.* 6*s.* 5*d.* and that that was the obligation which the borrower undertook. It may be that he did not understand it, and indeed, although it has been said that the calculation involved is a comparatively simple calculation, it is a calculation which would not be quite easy, one would suppose, to the class of persons who resort to professional moneylenders for assistance in their stress. If the contract of loan had been expressed as being a contract by the borrower to make twenty-three monthly payments of 3*l.*, with a final one of 1*l.* 6*s.* 5*d.*, there can be no doubt that the lenders would have been bound to say what the rate of interest would be in accordance with the provisions of the First Schedule to the Act. Can he escape from the obligation of setting out plainly the obligations which the borrower is undertaking ? Can he escape from the obligation of saying : 'The rate of interest is to be 48 per cent. per annum and you have to pay so many monthly instalments of 3*l.* to discharge your indebtedness ' ? In my opinion he cannot. I think the contract was a contract to make those monthly payments, and that the provisions of s. 6, sub-s. 2, of the Moneylenders Act, 1927, requiring that all the terms of the contract must be set out in the note or memorandum imposes upon the lender the obligation to insert in the memorandum the number of payments of 3*l.* that had to be made together with the final payment of 1*l.* 6*s.* 5*d.*, and that not having complied with the requirements of the section in that respect the contract for the repayment of the 45*l.* is unenforceable. The plaintiff is therefore entitled to succeed on the point that he has raised."

The defendants appealed.

P. Quass for the appellants. The judge was wrong in holding that the contract was unenforceable because the note or memorandum did not state the number of instalments payable. The judge in so holding invented a contract which was not the contract made between the parties. The contract between the parties was that the lenders agreed to lend the borrower 45*l.* in consideration of the borrower entering into the bill of sale under which the borrower agreed to repay the principal and interest at the rate of 48 per cent. by instalments of 3*l.* per month. The bill of sale was in the form set out in the Schedule to the Bills of Sale Act, 1882, as is required by s. 9 of that Act. There is no space in the statutory form of a bill of sale for stating the number of instalments payable. If the learned judge is correct it is not open to a moneylender to lend money on the security of a bill of sale. The point that the number of the instalments payable must be set out in the bill of sale has been taken in cases under the Bills of Sale Acts. But Vaughan Williams J. negatived that contention in *In re Bargen* (1), where he said: "It is quite true that the bill of sale does not on the face of it say how many instalments will be necessary to satisfy the amounts secured; but the statutory form of bill of sale seems open to the same objection. It may be that it involves a difficult calculation to arrive at the number of instalments; but the answer is that the statutory form seems itself to necessitate such a calculation." The majority of the Court of Appeal held in *Rosefield* v. *Provincial Union Bank* (2) that the words in the statutory form of bill of sale set out in the Schedule to the Bills of Sale Act, 1882, by which the borrower agrees that he will duly pay to the lender "the principal sum aforesaid, together with the interest then due, by equal —— payments of £—— on the —— day of ——," meant that the instalments successively payable should be equal in amount though they were to include payment of the interest then due as well as that of the principal. Vaughan Williams L.J. said (3): "This bill of sale does not, so far as its mere words, taken by themselves, are concerned, attain to any such certainty; because on the face of it the result of its provisions

(1) [1894] 1 Q. B. 444, 447.
(2) [1910] 2 K. B. 781.
(3) Ibid. 787.

is that, when the lump sums of 2*l*., which are to be paid as instalments under it, are respectively paid, a varying proportion of them respectively will be applicable to the payment of interest and to the payment of capital. The sum payable in respect of interest will obviously be diminishing, as the amount of the principal which has been paid off by the previous instalments increases." Buckley L.J. in his judgment (1) showed how the instalment was divisible between payment of principal and payment of interest. The judge in the present case has in effect said that it is not sufficient for the lender to set out the terms of the contract in the memorandum, he must go on to set out in the memorandum the effect of the contract. This is not required by the statute.

The respondent in person.

SCRUTTON L.J. This is an appeal from a decision of Macnaghten J., who has held that in a contract for a loan of money there is no valid memorandum of the terms of the contract, and that therefore under s. 6 of the Moneylenders Act, 1927, the contract is unenforceable. The action was by the borrower for a declaration that the contract was unenforceable. [His Lordship having read s. 6, sub-s. 1, of the Act of 1927, and sub-s. 2, which states what must be in the note or memorandum in order to make the contract enforceable, continued :] When the action came on for trial counsel for the borrower, Simmons, said that he had a preliminary point which had not been pleaded, but it must be implied that he asked for leave to amend as the learned judge proceeded to deal with the preliminary point. When the learned judge had decided the preliminary point in favour of the borrower, counsel for the borrower said that he would take no other point as he was content with the decision of the judge on the preliminary point, and that if the view of the learned judge should be held to be wrong in the Court of Appeal he would not ask for a new trial or ask that the various points which were raised on the pleadings should be decided.

The preliminary point was this : The memorandum, which

(1) [1910] 2 K. B. 806.

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was given to the borrower before the loan was made, was in this form: "Note or memorandum of contract made the 22nd May, 1930, between Russell Financiers, Limited"—they were the moneylenders—"and Elias Simmons," the borrower. The loan was made on May 22, 1930, the amount of the principal of the loan was 45*l.*, the rate of interest charged was 48 per cent. per annum. The loan was made on the terms of a bill of sale and the bill of sale is set out verbatim in the memorandum. It contains this clause: "The mortgagor doth further agree and declare that he will duly pay to the mortgagees the principal sum aforesaid, together with the interest then due, by equal monthly payments of 3*l.*, the first of such payments to be made on the 22nd day of June, 1930, and the like payments to be made on the 22nd of each and every succeeding month thereafter until the whole amount, including principal and interest, be repaid."

Counsel for the borrower at the trial said that it was true that the memorandum set out the date on which the loan was made, the amount of the principal of the loan, and the interest expressed in terms of a rate per cent. per annum, but it did not set out how many instalments were to be paid. Counsel contended that that was a matter which should be set out, and as it was not set out in the memorandum the contract could not be enforced. What the memorandum does do is to set out the whole of the bill of sale containing the terms on which the money was lent. It is said by Mr. Quass as counsel for the moneylenders that s. 6 of the Moneylenders Act, 1927, requires that the note or memorandum of the contract shall contain all the terms of the contract, and that the note or memorandum in the present case does contain all the terms of the contract, because it sets out all the terms of the contract as contained in the bill of sale, and in particular it sets out the matters which are mentioned in s. 6, sub-s. 2, of the Act of 1927. I am of opinion that a note or memorandum in that form does comply with the terms of s. 6, sub-s. 2, of the Act of 1927. A note or memorandum ought to set out all the terms of the contract, and in that form it does set out all the terms of the contract. What it does not set out is the construction which has been given by certain decisions of the Courts as to what the terms of the contract, which, in the case of a bill of sale, are in the statutory form, mean. It is quite true that it is necessary to make a calculation in order to find out how many instalments will be required in order to repay the principal together with interest at the rate stated in the contract, but that is merely the effect of the terms and not the terms themselves. The terms of the contract are in certain words which have been imposed by statute, and the decisions of the Courts have given explanations as to what those contracts mean. It would have been better, no doubt, if Parliament had imposed an obligation on the moneylender to state more precisely how many instalments the borrower had to pay and when those instalments would be completed. The question, however, has been raised in authorities to which we have been referred, and the majority of the Court of Appeal in *Rosefield* v. *Provincial Union Bank* (1), and particularly Buckley L.J., stated exactly what a contract expressed in the terms of the statute under which the principal sum advanced together with interest is repayable by instalments does mean—namely, that the instalments cover so much interest as is due on the principal at that time, and the balance goes in reduction of principal, with the consequence that each instalment which is punctually paid will include rather less for interest and rather more for repayment of principal. That is really the whole point. I quite feel that it is rather hard on borrowers that a statutory form of this sort should leave them to make a calculation which they are probably quite incapable of making, but Parliament has omitted to provide that any such information as to what the terms of the contract mean should be given in the memorandum. It is enough if the memorandum sets out all the terms of the contract, as it does in this case.

For these reasons I think Macnaghten J. came to a wrong conclusion when he decided that a memorandum in the statutory form of the Bills of Sale Act was bad because, although it expressed all the terms of the contract, it did

(1) [1910] 2 K. B. 781.

not say what their effect was in that particular case. I think the learned judge took a wrong view of the meaning and effect of the section, and consequently this appeal must be allowed.

GREER L.J. I agree. The Moneylenders Act, 1927, is in some sense a hardship on lenders far more than it is a hardship on borrowers. It was intended to protect borrowers from their own improvidence in agreeing to rather hard terms with regard to the repayment of money which they had borrowed. There are a number of provisions in the statute, quite apart from s. 6, which deal with avoiding the contract of loan because it was thought proper by Parliament to say that if a moneylender was not registered under the Act he could not enforce any of his contracts, and that if he made a contract of loan under any other name than his registered name he was not entitled to enforce that contract. Those provisions are directed to the avoiding of the contract of loan, entirely independent of the question as to what shall happen after the contract of loan is made. Sect. 6 of the Act of 1927, in order to give further protection to the borrower, provides that the borrower is to be protected if he does not receive a copy of the terms of the agreement of loan. What the moneylender has to do is to see that a correct copy of the memorandum of the contract is given to the borrower within seven days of the making of the contract. That provision has nothing to do with the question whether the contract of loan is avoided by any of the other sections of the Act or by reason of any principle of law; it only deals with the question whether the memorandum which has been given to the borrower is an accurate copy of the contract which has been agreed between them with regard to the loan.

The memorandum in this case is a complete memorandum of all the terms that had in fact been agreed, and if it is such a memorandum it is, in my judgment, a sufficient memorandum within the provisions of s. 6. The note or memorandum must contain all the terms of the contract, but there is no obligation that it must contain an explanation to the borrower of what the effect of the terms of the contract will be with regard to the amount of his payments and the length of time he will have to keep them up. If it is a correct memorandum of the terms that have been actually agreed it is a sufficient compliance with s. 6. Sub-s. 2 of that section provides: "The note or memorandum aforesaid shall contain all the terms of the contract"—and I think this memorandum quite clearly did contain all the terms of the contract—"and in particular shall show the date on which the loan is made"—it did show that date—"the amount of the principal of the loan"—it did show the amount of the principal—"and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act." The latter words seem to me to mean that if the interest charged on the loan is not expressed in terms of a rate per cent. per annum, then it must be expressed as a rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the Schedule. But here the interest charged on the loan was at a rate per cent. per annum, and it is so expressed in the memorandum of the agreement.

In my judgment the learned judge was wrong in thinking that there had been any breach of the provisions of the Act of 1927, and the appeal must be allowed with the usual consequences.

MAUGHAM L.J. I agree. I take the same view and hold that the decision of the learned judge was erroneous, but I do so with regret and hesitation. My regret and hesitation is due to the circumstance that a contract for the repayment of a loan by instalments, as in the present case, of *3l.* on the 22nd day of each month, is one which is or may be very difficult for a borrower to understand. That is not the less so if the form of the contract complies exactly with the statutory form which is to be found in the Bills of Sale Act (1878)

Amendment Act, 1882. What does such a contract or provision mean, when it is expressed in the terms of an obligation to pay the principal sum, together with the interest then due, by equal monthly instalments of, say, 3*l.*? It is impossible to suggest there is no ambiguity in such a provision, since no less a judge than Fletcher Moulton L.J. in *Rosefield* v. *Provincial Union Bank* (1) differed from Vaughan Williams L.J. and Buckley L.J. as regards the interpretation of precisely similar language. Fletcher Moulton L.J. pointed out (2) that one interpretation was that the form dealt with repayment of the principal and provided that it should be repaid by equal instalments on certain dates, and that with the obligation so to repay it there was to be coupled the obligation to pay the interest due at the time of payment of each instalment. The other interpretation, and the one which commended itself to the majority of the Court of Appeal in that case, was that the instalments payable should be equal in amount though they were to include the payment of the interest then due as well as that of the principal; such amount of the instalment as remained after payment of the interest due at that date being applied in payment of the principal. To a lawyer I think there can be no doubt that since the decision of that case the latter is the true construction of the provision, and accordingly the bill of sale in this case, which was set out verbatim in the memorandum of contract made between the parties and dated May 22, 1930, is one which involved the payment month by month of the interest then due with a small balance out of the 3*l.* which went in reduction of the principal sum due. In my opinion the memorandum of the contract in this case complies strictly with the terms of s. 6 of the Moneylenders Act, 1927. Sub-s. 2 of that section provides: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated

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(1) [1910] 2 K. B. 781.

(2) Ibid. 796.

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in accordance with the provisions of the First Schedule to this Act." It seems to me that following that provision all the matters referred to have been set out in the note or memorandum in the present case. I venture to express the opinion that the Legislature might well have made a provision that the note or memorandum of a contract of loan must be so worded that the borrower shall be made aware of the duration of the loan or shall be told in plain language precisely what it is that he is expected to pay on each occasion when a sum becomes payable. I am, however, satisfied that on the true construction of the Act it is impossible to say that any such term or provision can be implied in s. 6 of the Act, and accordingly I have come to the conclusion, although, as I have said, with some regret, that the judgment of the learned judge must be reversed.

Appeal allowed.
Judgment entered for defendants.

Solicitors for appellants: *Osborn & Osborn.*

R. F. S.

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June 18, 25;
July 27.

THE KING *v.* DONOVAN.

Criminal Law—Unlawful act—Indecent Assault—Defence of Consent—Burden of Proof—Questions for Jury.

The appellant, being charged with caning a girl of seventeen for purposes of sexual gratification, pleaded in defence that the prosecutrix had consented, and the chairman of quarter sessions in summing-up directed the jury that "consent or no consent" was the vital issue in the case:—

Held, that there was misdirection, in that the question should have first been put to the jury, whether the blows struck were likely or intended to do bodily harm. If this were answered in the negative, then only would it have been necessary for the jury to consider the further question, whether the prosecutrix had proved absence of consent.

An act, unlawful per se as being criminal, cannot be rendered lawful because the person to whose detriment it is done consents to it.

Exceptions to this rule discussed and classified.

Observations of Cave J. in *Reg.* v. *Coney* (1882) 8 Q. B. D. 534 at p. 539 considered.

Burden of proof and questions for jury, where consent is in issue, explained.

APPEAL against conviction.

The appellant was charged at Surrey Quarter Sessions with (*a*) indecent assault, and (*b*) common assault, upon a girl aged seventeen. The case for the prosecution was that on the evening of March 8, 1934, he induced her to accompany him to his garage at Morden in the county of Surrey, and that he there beat her with a cane. The defence raised was that the girl had consented to everything which the appellant had done, and that the onus was upon the prosecution to prove absence of consent. He was found guilty by the jury and sentenced by the learned chairman to eighteen months' imprisonment for the indecent assault, and to six months for common assault, the sentences to run concurrently. From this conviction he appealed on the ground of misdirection by the learned chairman in his summing-up to the jury in certain respects, which appear clearly from the following judgment of the Court of Criminal Appeal. A second ground of appeal was that the verdict was unreasonable and could not be supported upon the evidence.

G. B. McClure for the appellant. The direction to the jury as to the incidence of the burden of proof in relation to consent was wrong. The facts proved showed that the jury might reasonably find consent on the part of the prosecutrix, and the chairman should have directed them that the burden of proof was on the prosecutrix to negative consent: *Rex* v. *May*. (1)

Secondly, the conduct of the prosecutrix should be looked at as a whole, and if the jury had been directed to this effect it is possible that they would have found consent upon her part and would have acquitted the appellant. Thus in *Reg.* v. *Tolson* (2) it was laid down that a bona fide belief

(1) [1912] 3 K. B. 572, 575.

(2) (1889) 23 Q. B. D. 168.

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on reasonable grounds that the husband was dead constituted a good defence on a charge of bigamy. The appellant may have been mistaken in thinking that the girl was consenting, but the belief remains good as a defence to a charge of indecent assault. This applies to all offences at common law or under statute, unless some injury to the public is involved. Again in *Reg.* v. *Flattery* (1), which was a case of rape, Denman J. said: "There may be cases where a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does." This is subject to the general limitations laid down in *Reg.* v. *Coney* (2), in which Stephen J. said: "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured." Again, Hawkins J. said in the same case: "As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all." He goes on to say that "it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution." But it is submitted that these limitations do not apply here. The act complained of is not illegal in itself and the injuries are only the marks of a cane which would appear in administering ordinary corporal punishment. There was no breach of the King's peace, nor was there any injury to the public, as in a prize fight, nor any unfriendly relationship. The question of the degree of violence in the assault was a matter which should have been left to the jury. It cannot be said that this Court should not interfere, because the verdict of the jury would have been the same if the misdirection were cured. If the summing had been adequate, the case could not have come before this Court. Furthermore, the proper questions should have been put to the jury before this verdict could be given.

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(1) (1877) 2 Q. B. D. 410, 414.

(2) 8 Q. B. D. 534, 549, 553.

C. G. L. Du Cann for the Crown. The consent of the prosecutrix here would be no defence, for the assault is one which would be likely to cause a breach of the peace, or at least an injury to the public, and consent is immaterial, as explained by Cave J. in *Reg.* v. *Coney.* (1) The exceptions there stated to the rule that consent cannot operate as a defence to a criminal act do not cover flagellation for purposes of sexual gratification. In cases of indecent assault consent is only a defence where the act itself is not one likely to produce injurious consequences. There is no parallel to the case of rough play, where the act of assault only becomes unlawful if the person affected is not a consenting party.

[DU PARCQ J. referred to *Reg.* v. *Bruce.* (2)]

Here the assault is of a kind prohibited as being contrary to public morality, and no consent on the part of the individual affords an answer to a criminal charge. If a prize fight is an assault for which there is no condonation, this is an a fortiori case. As to the jury's answer to the question " consent or no consent " it is justified so far as it goes, for mere non-resistance or submission does not constitute permission on the part of the prosecutrix. The directions given to the jury by the learned chairman may not have been adequate as regards the degree of violence in the assault, but they satisfy the rules laid down in *Rex* v. *May* (3), and the verdict should stand.

McClure in reply. The questions put to the jury and the answers which they gave are so defective that this Court would have to substitute a verdict of its own if the conviction were to stand. Unless the blows struck by the appellant were such as to cause bodily harm, the question of consent was relevant, and the onus was upon the prosecution to negative consent. This the prosecution failed to do, and as to this the jury were not properly directed, so that the conviction here should be quashed.

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(1) 8 Q. B. D. 534, 539.

(2) (1847) 2 Cox, C. C. 262.

(3) [1912] 3 K. B. 572.

At the conclusion of the argument the Court (LORD HEWART C.J., SWIFT and DU PARCQ JJ.) allowed the appeal, and Lord Hewart C.J. said that as questions of importance were involved, the considered judgment of the Court would be given at a later date.

July 27. SWIFT J. In this case the Lord Chief Justice has asked me to read the judgment of the Court.

The appellant was convicted at the Surrey Quarter Sessions upon an indictment charging him with indecent assault and common assault on Norah Eileen Harrison. He was sentenced to eighteen months' imprisonment with hard labour upon the count for indecent assault, and to six months' imprisonment with hard labour upon the count for common assault, the sentences to run concurrently. He was given leave to appeal against conviction. There was no appeal against sentence. The appellant complained that the chairman misdirected the jury in the summing-up and in the reply which he gave to a question put to him by the jury, and that the verdict was unreasonable and could not be supported upon the evidence. It was established by the evidence, and was not in dispute, that on March 8 last, in the evening, the appellant induced Norah Eileen Harrison, a girl seventeen years of age, to go with him to a garage at Morden, and there he beat her with a cane in circumstances of indecency. The defence was that it lay upon the prosecution to prove absence of consent, and that in fact the girl had consented to everything that was done by the appellant. It is not necessary to narrate the facts in detail. It appeared that the appellant was addicted to a form of sexual perversion, and there was no doubt that during a series of telephone conversations he had made suggestions to the prosecutrix which, if they were taken seriously, meant that he intended or desired to beat her. According to the evidence of the appellant, and of a young woman who said that she had overheard some of the telephone conversations, there was talk between the appellant and the prosecutrix which left no doubt that she had expressed her willingness to submit herself to the kind of conduct to which he was addicted. On the evening of March 8 she met him for the first time, and met him, according to her evidence, in the belief that she was to be taken to a place of entertainment, "the pictures." They met by appointment at the Marble Arch. It was common ground that his first remark was: "Where would you like to have your spanking, in Hyde Park, or in my garage?" but the prosecutrix said that she did not treat the question seriously. She went with him, however, on the Tube railway to Morden, and then to a garage, either, as she said, because she was compelled or induced by fear to do so, or, as he maintained, willingly and in pursuance of a common design. The garage is described as being in a passage-way between two houses. There the alleged offences were committed. In addition to the girl herself, three witnesses were called on behalf of the prosecution. A doctor who had examined her at 9.40 P.M. on March 10, said that there were seven or eight red marks upon her body, and expressed the opinion that these marks indicated that she had suffered a "fairly severe beating." He found no sign of any other injury. A married sister of the prosecutrix deposed that she had returned home just after 10 o'clock on the night of the alleged assault looking pale and ill, and had made a complaint which was consistent with her evidence. A detective inspector who arrested the appellant on March 13 proved that he found in the possession of the appellant a sealed envelope, the terms of which left no doubt as to the nature of the practices to which he was addicted.

The appellant gave evidence on his own behalf, asserting that the prosecutrix had so acted throughout as to make it plain that she consented to all that he did. The young woman who has already been mentioned was called, and gave evidence about the telephone conversations to which she had listened. It is enough to say that her evidence, if believed, showed that the prosecutrix went to the garage with full knowledge of the appellant's intentions, and without reluctance.

At the close of the case for the defence, and before counsel addressed the jury, counsel for the Crown submitted (in the absence of the jury) that, in the circumstances of the case, it was unnecessary for the prosecution to prove absence of consent. After hearing the argument, the justices ruled against this submission. The jury returned into Court, and the chairman summed up to them upon the footing that the question "consent or no consent" was the vital issue. If it be assumed that a verdict of guilty could be justified in this case only by proof that there was absence of consent, certain observations may properly be made. First, it was of importance that the jury should be left in no doubt as to the incidence of the burden of proof in relation to consent. In *Rex* v. *May* (1) the principle applicable to cases of this kind was laid down by this Court in these words: "The Court is of opinion that if the facts proved in evidence are such that the jury can reasonably find consent, there ought to be a direction by the judge on that question, both as to the onus of negativing consent being on the prosecution and as to the evidence in the particular case bearing on the question."

We have no doubt that the facts proved in the present case were such that the jury might reasonably have found consent; it is, indeed, difficult to reconcile some of the admitted facts with absence of consent. It was therefore of importance (if consent was in issue) that there should be no possibility of doubt in the minds of the jury upon the question whether it was for the Crown to negative consent, or for the defence to prove it. A second observation which may fairly be made is that consent, being a state of mind, is to be proved or negatived only after a full and careful review of the behaviour of the person who is alleged to have consented. Unless a jury is satisfied beyond reasonable doubt that the conduct of the person has been such that,

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(1) [1912] 3 K. B. 572, 575.

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viewed as a whole, it shows that she did not consent, then the prisoner is entitled to be acquitted. It is evident to the Court that the chairman was at pains to sum up an unusually difficult case with impartiality and precision. We think, nevertheless, that if the summing-up be looked at in the light of the observations which we have made, it will be seen to be defective in two respects. First, we cannot find that the chairman ever gave a clear direction to the jury that the onus of negativing consent was on the prosecution. In that part of the summing-up where this aspect of the case is specifically dealt with, the chairman, after using the words "if there is consent, that is a complete answer," went on to say: "Next you get to this vital question in the case, and that is whether the complainant in this case . . . . was, as she alleges, compelled by fear to submit to the defendant's wishes, or whether, as he alleges, there was no compulsion; that is the point. Because if there was no compulsion, if she was not, as she alleges, compelled by him to comply with his wishes, then she was a consenting party, and that is a good defence to each of the charges." This material passage from the summing-up is, we think, so phrased as to leave the jury in doubt where the burden of proof lay on this part of the case, if, indeed, it did not lead them to believe that it was for the appellant to establish the defence of consent. Other words were used in the summing-up and in the observations made by the chairman in answer to questions put to him by the jury after he had concluded his summing-up which have some bearing upon this point, but we think it unnecessary to comment upon them in detail, inasmuch as it was conceded by the learned counsel for the Crown that he could not point to any direction which fulfilled the requirement laid down in the passage from *Rex* v. *May* already mentioned. (1)

The second matter of complaint is a direction given to the jury in answer to a question. After a retirement which lasted for one hour, the jury returned into Court and handed a note to the chairman. The shorthand note of what then took place is as follows: "(The Chairman): Members of the jury, the question put to me is: If a man has reason to think that consent has been given, does that constitute consent? The answer is definitely 'No.' It is a question of fact. Do you want to retire again? (The foreman of the jury): I do not think we need retire again." The jury then "shortly conferred without leaving the jury box," and returned their verdict of "Guilty." In our view this direction is open to grave objection. It is no doubt true that consent is a question of fact. The state of a person's mind is a question of fact, but, as we have said, it can be ascertained only by considering and weighing the ascertained facts about that person's conduct. The proper answer to the jury's question would have been that if they as reasonable persons thought that the conduct of the prosecutrix, viewed as a whole, was consistent with consent, they ought not to find that the prosecution had negatived consent. It is, in our view, at least possible that such a direction, coupled with a correct and unambiguous direction as to the burden of proof, would have resulted in the acquittal of the appellant, and we are, therefore, compelled to come to the conclusion, notwithstanding the evident desire of the chairman to do justice to the appellant's case, that the trial was not satisfactory.

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(1) [1912] 3 K. B. 572.

This conclusion would have been enough to dispose of the case were it not for the fact that the learned counsel for the Crown relied in this Court upon the submission which he had unsuccessfully made at the trial, and argued that, this being a case in which it was unnecessary for the Crown to prove absence of consent, this Court ought not to quash the conviction.

We have given careful consideration to the question of law which this submission raises. The learned counsel on both sides referred us to passages in the judgments in the case of *Reg.* v. *Coney*. (1) The subject-matter of that case was very different from that of the present case, but the judgments undoubtedly contain statements of the law which are of great value for the present purpose. Much reliance was placed, on

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(1) 8 Q. B. D. 534, 539.

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behalf of the Crown, upon the following passage from the judgment of Cave J.: "The true view is, I think, that a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial." We have considered the authorities upon which this view of the learned judge was founded, and we think it of importance that we should state our opinion as to the law applicable in this case. If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection, may, in another, be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. We are aware that the existence of this rule has not always been clearly recognized. In his Digest of the Criminal Law (6th edition), Art. 227, Sir James FitzJames Stephen enunciates the proposition that "every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." This may have been true in early times when the law of this country showed remarkable leniency towards crimes of personal violence, but it is a statement which now needs considerable qualification. It is to be observed, indeed, that in Art. 230 of his Digest, the learned author says: "It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another."

In early works of authority, such as Foster's Crown Law and East's Pleas of the Crown, much learning upon the distinction between lawful and unlawful acts is to be found in the chapters dealing with homicide. At p. 259 of the former work (third edition), Sir Michael Foster gives his reason for the proposition that a man who beats another "in anger or from preconceived malice" is responsible if fatal consequences ensue, in the following words: "What he did was malum in se, and he must be answerable for the consequence of it. He certainly beat him with an intention of doing him some bodily harm, he had no other intent, he could have no other; he is therefore answerable for all the harm he did." If an act is malum in se in the sense in which Sir Michael Foster used the words, that is to say, is, in itself, unlawful, we take it to be plain that consent cannot convert it into an innocent act.

There are, as we have said, well established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by Sir Michael Foster in the chapter just cited, where he refers to the case of persons who in perfect friendship engage by mutual consent in contests, such as "cudgels, foils, or wrestling," which are capable of causing bodily harm. The learned author emphasizes two points about such contests: (1.) that bodily harm is not the motive on either side, and (2.) that they are "manly diversions, they intend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need." For these reasons, he says that he cannot call these exercises unlawful.

Another exception to the general rule, or, rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm. An example of this kind may be found in *Reg.* v. *Bruce*. (1) In such cases the act is not in itself unlawful, and it becomes unlawful only

(1) 2 Cox, C. C. 262, 263.

if the person affected by it is not a consenting party. It is not necessary to deal in this judgment with other exceptions to the rule which are wholly remote from the present case, such as the reasonable chastisement of a child by a parent or by a person in loco parentis. In the present case it was not in dispute that the motive of the appellant was to gratify his own perverted desires. If, in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse, and it may truly be said of him in Sir Michael Foster's words that " he certainly beat him with an intention of doing him some bodily harm, he had no other intent," and that what he did was malum in se. Nothing could be more absurd or more repellent to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those " manly diversions " of which Sir Michael Foster wrote. Nor is his act to be compared with the rough but innocent horse-play in *Reg.* v. *Bruce.* (1) Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent. For this purpose we think that " bodily harm " has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.

This being our view of the law, we considered the question whether, in all the circumstances, it would be right to quash the conviction. The whole case was conducted, in so far as it was conducted in the presence of the jury, upon the footing that the issue of consent was the " vital question in the case."

(1) 2 Cox, C. C. 262.

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It is not too much to say that, in all probability, the only question which the jury felt called upon to decide, as the case was left to them, was the question whether in fact the prosecutrix was shown to have consented. We may summarize the position by saying that, of the two questions which should have been left to the jury, the first was not left at all, while the second was left to them with an inadequate and misleading direction. It may well be that, if the first question had been left to the jury, they would have answered it by saying that the appellant intended to cause and inflicted blows likely to cause bodily harm to the prosecutrix, so that the second question would not have arisen. But, although we think it probable that this would have been the jury's view, it is, in our opinion, impossible to say that they must inevitably have so found. There are many gradations between a slight tap and a severe blow, and the question whether particular blows were likely or intended to cause bodily harm is one eminently fitted for the decision of a jury upon evidence which they have heard. We may have little doubt what that decision would have been in this case, but we cannot, consistently with the practice of this Court, substitute ourselves for the jury and decide a question of fact which was never left to them. It is, therefore, impossible to say that facts have been proved which show the appellant's act to have been unlawful in itself. Without proof of such facts, he could be convicted only if the prosecution negatived consent, and upon the issue of consent there was a misdirection which may have led to a wrong verdict. For these reasons we came to the conclusion that the conviction must be quashed and the appellant discharged.

Appeal allowed.

Solicitors for appellant: *Wilkinson, Howlett & Moorhouse.*
Solicitors for prosecution: *Wontner & Sons.*

F. P. F.

ALFRED LENEY & COMPANY, LIMITED *v.* WHELAN (INSPECTOR OF TAXES).

C. A.
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June 25, 26.

Revenue—Income Tax—Licensed premises subject to "tying" covenant—Lease—Rent paid by Lessees in excess of Sch. A Assessment—Assessment on Lessors under Sch. D in respect of benefit derived from tie—Rent whether divisible—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, r.* 1 ; *Sch. D, Cases I. and VI.*

In 1926 a firm of brewers who were retiring from business and who held a number of freehold and leasehold properties, the majority of which were licensed and subject to "tying" covenants, entered into an informal agreement with another firm of brewers to grant them leases of the freehold and leasehold properties, including the plant and fixtures in connection with their brewery, for a term of 36 years from October 1, 1926, at a rent based on the average net profits for the previous three years. The agreement was carried out and the leases were duly granted. The premises handed over under the leases were assessed to income tax under Sch. A, the amount of which was deducted by the tied tenants from the rent paid by them to the lessees, who in their turn deducted it from the rent paid to the lessors.

An assessment under Sch. D was made on the lessors in respect of the sum representing the difference between the amount of the rent received by them from the lessors and the amount of the Sch. A assessment:—

Held (reversing the decision of Finlay J.), that the rent paid by the lessees to the lessors was one rent only and could not be split up into two parts representing (1.) Sch. A rent and (2.) the benefit arising from the tie, and that the liability of the lessors to tax was exhausted by the Sch. A assessment.

APPEAL from a decision of Finlay J. on a case stated by the Special Commissioners of Income Tax.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on May 2, 1933, for the purposes of hearing appeals, Alfred Leney & Co., Ld., hereinafter called "the appellant Company," appealed against a series of estimated assessments to income tax for the years 1926–27 to 1932–33 inclusive, made upon the appellant Company under the provisions of Sch. D of the Income Tax Acts in respect of profits arising from payments received by it from Fremlin Brothers, Ld., and Fremlins, Ld.

2. The appellant Company had for many years carried on the business of brewers, with a brewery at Dover. In the

course of and for the purpose of this business it held a number of freehold and leasehold properties, the majority of which were licensed and were let to tied tenants.

3. On October 18, 1926, the appellant Company entered into an informal agreement with Fremlin Brothers, Ld., to grant a lease to Fremlin Brothers, Ld., of all its freehold and leasehold properties including plant and fixtures, except the mineral water and cordial factories and buildings used or held therewith, for a term of 36 years from October 1, 1926, at a rent equivalent to the average net profits of the appellant Company for the three years ending September 30, 1926, subject to modifications and to a provision that in the case of leaseholds which expired during the term of the new lease and were not renewed the rent should be reduced thereafter by 1*l.* per barrel sold in the house comprised in the expired lease on the average of the three years prior to the expiration of the lease, with further provisions as to what was to be done in the case of leases renewed or properties sold.

There was a further provision that: "The rent is to be reduced by the Sch. A tax paid by (or deducted from the rent paid to) Fremlins on the properties included in the new lease. It is also to be reduced if necessary by the following amount. Fremlins will in paying the rent under the new lease, deduct only the Sch. A tax on the houses included therein (the total assessments being less than the new rent). They will seek to deduct in their own income tax return the whole rent payable by them to Leneys. If after due efforts they fail to get this allowance from the Inland Revenue, then the amount of income tax which they lose by such failure is to be deducted from the rent."

4. Immediately after the signature of the said agreement, Fremlin Brothers, Ld., began to supply beer to the appellant Company's tied tenants, and the appellant Company's brewery was closed down in December, 1926.

5. On June 21, 1928, the appellant Company entered into four formal agreements, marked respectively B, C, D and E, to grant leases of its properties to Fremlin Brothers, Ld. B related to the unencumbered properties held by the appellant

Company on leases for terms of which less than 36 years remained to run, C to unencumbered freeholds and long leaseholds, D to freeholds and long leaseholds charged under the appellant Company's debenture trust deed, and E to short leaseholds similarly charged. The trustees for the appellant Company's debenture holders were made parties to the agreements D and E.

6. By the agreement B the appellant Company agreed to grant to Fremlin Brothers, Ld., a lease in the form set forth in the schedule thereto of the leasehold premises therein described, commencing as from October 1, 1926, for the respective residues of the terms therein to which the appellant Company was entitled except the last three days thereof at a rent of 938*l.* 14*s.* 8*d.* for the first year and for subsequent years of the said sum as adjusted as provided by the above mentioned agreement of October 18, 1926, to be further adjusted from time to time as provided by the said form of lease. The form of lease provided for the demise to Fremlin Brothers, Ld., then successors and assigns of the lands and premises specified in the schedule thereto subject to and with the benefit of the existing tenancies thereof and subject to the rights exceptions reservations stipulations covenants conditions and liabilities therein mentioned or otherwise then affecting the same (other than head rents). Provision was made for adjustment of the rent on the expiration or renewal of the lease of any of the premises demised. The name of the appellant Company was during the respective terms of the lease to continue to be conspicuously exhibited on the licensed premises demised. The agreements C, D and E were mutatis mutandis similar to the agreement B, the rents reserved for the first year being 2433*l.* 13*s.* 5*d.* for the freeholds and long leaseholds unencumbered, 17,078*l.* 2*s.* 10*d.* for the freeholds and long leaseholds charged under the debenture trust deeds, and 1066*l.* 12*s.* 9*d.* for the short leaseholds similarly charged. The term of the leases of the freeholds and long leaseholds was 36 years from October 1, 1926. The leases contemplated by these four agreements were never in fact executed.

It was not in dispute that the agreements referred to in this paragraph, together with the agreements referred to in para. 3 above, governed the position as from October 18, 1926.

7. Between 1928 and 1930 the business of Fremlin Brothers, Ld., was transferred to another company called Fremlins, Ld. On May 20 and December 10, 1930, the appellant Company executed four leases to Fremlins, Ld., marked respectively F, G, H and J. By these leases the appellant Company (and the trustees for its debenture holders in the case of the properties charged to them) demised respectively its short leaseholds not encumbered, its freeholds and long leasehold properties not encumbered, its freehold properties charged under the debenture trust deed, and its leasehold properties charged by the trust deed. The term of the lease was 34 years from October 1, 1928, in the case of the freeholds and long leaseholds and the respective residues of the terms for which the short leaseholds were held by the appellant Company less the last three days thereof, and the commencing rents were modified in accordance with the previous agreements. In all other material respects the leases followed the forms set forth in the corresponding agreements B, C, D and E.

8. A schedule marked K of the properties held by the appellant Company on October 1, 1926, was attached to and formed part of the case. The rents shown in the last column of the schedule were the rents payable by the tenants of the properties to the appellant Company up to October 1, 1926, and thereafter to Fremlin Brothers, Ld. The properties marked with the letter L in red were licensed houses, and all these licensed houses were let to tied tenants. Specimen copies, marked L, M and N, of the tenancy agreements entered into by the appellant Company, Fremlin Brothers, Ld., and Fremlins, Ld., with the tied tenants were attached to and formed part of the Case. These agreements contained an undertaking by the tenant :—

"To purchase from the landlords or their nominee or nominees and from no other company or companies person or persons all ale beer stout porter and other malt liquors and wines and spirits whether in cask or bottle and mineral waters which may be received vended or consumed upon or out of the said premises during the tenancy at the prices set out in the schedule hereto so far as the same are so set out and if and where not set out then at the landlords' usual list prices for tied houses for the time being and not during the said tenancy directly or indirectly to buy receive sell or dispose of in upon out of or about the said house and premises or any part thereof or suffer to be brought thereon any ale beer stout porter or other malt liquor or wines and spirits either in cask or bottle or any mineral water except such as shall have been purchased of the landlords or their nominee or nominees." The specimen form of agreement entered into by the appellant Company was the form in existence at the time when the appellant Company first entered into an agreement for lease with Fremlin Brothers, Ld., and agreements in that form were still running in all cases in which there had not been any change of tenancy of the licensed houses.

It was not disputed on behalf of the respondent that the benefit of the tie imposed upon the several tenants of the licensed houses ran with the land and was enforceable by Fremlin Brothers, Ld., and by Fremlins, Ld., during the periods in which they respectively were entitled to the reversion expectant on the determination of the terms granted to the tenants.

9. The tenants of the houses were assessed to income tax under Sch. A on the annual value thereof as occupiers, and when paying their rents to Fremlin Brothers, Ld., or Fremlins, Ld., they had deducted so much of the tax so assessed and paid by them as was permissible under the Income Tax Act, 1918, Sch. A, No. VIII., r. 1. On paying to the appellant Company the rents reserved by the leases to them, Fremlin Brothers, Ld., and Fremlins, Ld., had deducted therefrom the tax thus suffered by them on payment by the tenants. The last mentioned companies had not made any further deduction on account of income tax in excess of the amounts assessed under Sch. A.

10. A statement marked O was attached to and formed part of the Case showing the amounts of the rents received

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by the appellant Company from Fremlin Brothers, Ld., or Fremlins, Ld., under the leases or agreements for lease for each of the years ending September 30, 1927, to September 30, 1932, inclusive. The amounts of these rents ranged from 21,684*l*. 6*s*. 8*d*. to 19,361*l*. 0*s*. 10*d*. For the purposes of the Case it was agreed that the aggregate Sch. A assessments on the whole of the properties comprised in the leases or agreements for lease might be taken as ranging over the same period from 8008*l*. gross or 6079*l*. net to 7264*l*. gross or 4965*l*. net, or in other words that while the average of the rents received was about 20,000*l*. a year the average of the net Sch. A assessments on which tax was paid was about 5500*l*.

11. The appellant Company relied on the documents put in, and did not call any evidence. Evidence was given on behalf of the respondent by Mr. A. E. Killick, F.S.I., a superintending valuer in the Inland Revenue Department, who was in charge of the work done by that Department in connection with the valuation of licensed premises for the purpose of assessment of such premises to income tax under Sch. A, and who had had considerable experience of the licensed trade. He stated that the figures to be submitted to the Local Commissioners of Taxes as representing the annual values of the licensed premises held by the appellant Company were discussed and agreed between a member of his staff and a representative of the appellant Company before the assessments under Sch. A were made for the year 1922–23. The figures were again discussed and agreed for the purposes of the assessments under Sch. A for the year 1931–32 between his Department and a representative of Fremlins, Ld., to whom the premises had then been leased. Taking the figures as a whole, there had not been any very substantial alterations in the valuations between the two periods. The basis of the valuations was the amount which a hypothetical free tenant (i.e., a tenant not tied to buy from a particular brewer) would be willing to pay by the year, the landlord doing repairs and paying for insurance. Regard was had to the retail trade to be carried on in the

houses, but no account was taken of the wholesale profits which a brewer could make by reason of his having the right, under tying covenants, of supplying the licensed premises with the commodities consumed or sold thereon. To secure this right and the consequent profits a brewer would be prepared to pay a higher rent than a free tenant would give. In the present case Fremlin Brothers, Ld., could make a greater profit than the appellant Company, as they would save a large proportion of the overhead charges, and the rent which they agreed to pay, which was based upon the average profits of the appellant Company, bore no relation to value of the houses as estimated for the purposes of the Sch. A assessments, but was influenced by considerations of the brewer's profits which were ignored in arriving at the Sch. A assessments. This evidence was not challenged by the appellant Company, who submitted that it was irrelevant.

12. It was contended on behalf of the appellant Company :—

(*a*) That the payments received by the appellant Company under the leases or agreements for lease were true rents issuing out of corporeal hereditaments ;

(*b*) That the subjects demised were corporeal hereditaments and nothing else ;

(*c*) That there was no authority for analysing these payments : there was nothing to analyse ;

(*d*) That the tying covenants in the agreements with the tenants of which the lessees obtained the benefit were restrictive and ran with the land, and any advantages that might be derived from them flowed from the corporeal hereditaments demised ;

(*e*) That the appellant Company's liability to income tax in respect of the rents reserved was limited to the amount of the tax assessed on the properties under Sch. A and deducted from the rents ;

(*f*) Alternatively, if any part of the payments received by the appellant Company was chargeable under Sch. D, r. 19 of the General Rules applicable to All Schedules precluded any assessment on the appellant Company.

13. It was contended on behalf of the Crown:—

(*a*) That the liability of the appellant Company to income tax in respect of the payments in question was not exhausted by the payments by deduction of the tax assessed on the properties under Sch. A;

(*b*) That the effect of the transaction was to transfer to the lessees the goodwill of the appellant Company's trade with the tied tenants;

(*c*) That under the terms of the leases or agreements for lease the properties were demised subject to and with the benefit of the existing tenancies and subject, inter alia, to the covenants by which the tenants were tied as regards the purchase of beer and other commodities;

(*d*) That the benefit of the tying covenants was severable from the ownership of the properties, and might, if it had been so desired, have been reserved by the appellant Company or transferred to another brewer independently of any demise of the properties;

(*e*) That the assessments on the properties under Sch. A were necessarily restricted to their bare annual value, without taking into the brewer's profits or the enhanced rents which a brewer would be prepared to give to secure such profits by the use of the properties as tied houses;

(*f*) That the Commissioners were entitled to inquire into what the rents in fact were paid for;

(*g*) That the rents were in fact paid partly for premises assessable under Sch. A and partly for other matters;

(*h*) That the payments received by the appellant Company were not paid wholly out of profits or gains brought into charge to income tax and r. 19 of the General Rules applicable to All Schedules did not apply;

(*i*) That such part of the rents as was not paid for premises assessable under Sch. A was a receipt of the Company to be taken into consideration in arriving at its liability under Sch. D of the Income Tax Acts;

(*j*) That such last mentioned part (i.) was the difference between the total rents paid to the appellant Company and the total of the Sch. A assessments on the various properties or alternatively, (ii.) was that part of the total rents paid which was found as a fact to be paid for matters outside the purview of Sch. A.

14. Reference was made to the following cases: *Campbell* v. *Inland Revenue* (1); *Fry* v. *Salisbury House Estate, Ld.* (2); *James Shipstone & Sons, Ld.* v. *Morris* (3); *Windsor Playhouse, Ld.* v. *Heyhoe* (4); *Bradford-on-Avon Assessment Committee* v. *White.* (5)

15. The Special Commissioners gave their decision in the following terms:—

"By the deeds or agreements entered into by the appellant Company the premises were demised or agreed to be demised subject to and with the benefit of the existing tenancies thereof and subject to the covenants therein mentioned or otherwise affecting the same. Among the covenants affecting the tenancies of the tied houses were the covenants by which all the tenants were tied to purchase from the landlords or their nominees and from no other company or person all beer and other malt liquors, cider, wines, spirits and mineral waters vended or consumed on or out of the premises. The benefit of these tying covenants was thus transferred to the lessees, and the transfer to the lessees of the trading connection which the appellant Company previously had with the tenants of the tied houses was evidently the primary object of the arrangement. It does not seem to us to be of primary importance whether this trading connection be described as goodwill or not. The arrangements originated in the agreement of October 18, 1926, under which the rent payable was fixed as the equivalent of the average net profits of the appellant Company for the three years ending September 30, 1926, with modifications. In arriving at the amounts of the Sch. A assessments the profits which a brewer could make by the use of the premises as tied houses, or the enhanced rents which he would be willing to pay to secure those profits, were ignored, and on the authorities were rightly ignored.

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(1) (1879) 1 Tax Cas. 234.

(2) [1930] A. C. 432.

(3) (1929) 14 Tax Cas. 413.

(4) (1933) 17 Tax Cas. 481.

(5) [1898] 2 Q. B. 630.

The payments received by the appellant Company therefore included an element which was not and could not be taken into account in estimating the annual value of the hereditaments for the purpose of assessment to tax under Sch. A. In our opinion this element which is excluded from consideration for the purposes of taxation under Sch. A is a profit chargeable to income tax under Sch. D, and the grounds for attributing the whole of the excess of the payments over the aggregate of the Sch. A assessments to this element are stronger in this case than they were in that of the *Windsor Playhouse, Ld.* v. *Heyhoe.* (1) We accordingly hold that the assessment under Sch. D should be confirmed in the amounts of the excess of the payments received by the appellant Company over the aggregate amounts of the Sch. A assessments on the premises demised."

"We subsequently reduced the assessments to figures which have been agreed between the parties to be correct on the basis of this decision on the question of principle."

Finlay J. affirmed to decision of the Special Commissioners.

The appellant Company appealed. The appeal was heard on June 25, 26, 1934.

Latter K.C. and *Cyril King* for the appellants.

Sir Donald Somervell S.-G. and *R. P. Hills* for the Crown.

LORD HANWORTH M.R. This case raises a point which has quite recently been a good many times before the Courts. It really is this: whether, when taxation to income tax has been imposed under Sch. A, that concludes the whole liability to tax, or whether it is possible, by means of further assessments under Sch. D, to cover something which stands apart from and outside the area which is taxed under Sch. A.

The facts must be shortly stated; they are contained in full in the Case. The appellant Company, Alfred Leney & Co., Ld., were brewers who had a considerable business, and they had, in the course of carrying on their business, a number of freehold and leasehold properties, the majority of which were licensed and were let to tied tenants. On October 18,

(1) 17 Tax Cas. 481.

1926, the appellant Company entered into an informal agreement with Fremlin Brothers, Ld., under which they undertook to grant a lease to Fremlin Brothers, Ld., of all their freehold and leasehold properties, including plant and fixtures, which were used in connection with the brewery, for a term of 36 years from October 1, 1926, at a rent which was quantified at a sum based upon the average net profits of the appellant Company for the previous three years ending on September 30, 1926. That rent was subject to modification, and the lease contains a provision applicable to leaseholds the term of which expired during the term of the new lease. That agreement was carried out. The leases were granted, and from and after that time the brewery business and the supply of beer to those houses were carried on and provided by Fremlin Brothers, Ld. The appellant Company's brewery was absolutely closed down in December, 1926, and from and after that time they ceased to carry on the business of brewers. They have received the rents which were specified in the several leases, and that is all that they have got from the activities which they carried on before October, 1926.

The premises which have been handed over under leases to Messrs. Fremlin have been taxed under Sch. A and the sums at which their annual value has been estimated have taken into account, as it is right they should do, that these houses which fall within Sch. A were tied houses.

The way in which to estimate the value under Sch. A has been laid down in a number of cases. Farwell L.J. in *Rex* v. *Shoreditch Assessment Committee* (1) says: " The question is not what rent will a particular individual give, but what will the hypothetical tenant give: it is on this ground that the ' tie ' is disregarded in valuing tied houses; the hypothesis deals with the ordinary individual, not with a man bound by special covenants." But, as has been pointed out in a number of cases, it is right that the fact that it is a tied house should be taken into account in this sense, that there are persons who may be ready to give an enhanced value for the house—namely, brewers.

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(1) [1910] 2 K. B. 859, 883.

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Channell J. in *Bradford-on-Avon Assessment Committee* v. *White* said this (1): "I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special prices which they may give, owing to personal considerations, and not on account of the value of the premises, should be excluded except so far as the possibility of such special prices being obtained raises the market value generally." That means that the question should be considered whether the competition of brewers had raised the market value of the public-houses in the district. That is the right way in which this question of tie should be used.

We are told in the Case that "the basis of the valuations was the amount which a hypothetical free tenant . . . . would be willing to pay by the year, the landlord doing repairs and paying for insurance. Regard was had to the retail trade to be carried on in the houses, but no account was taken of the wholesale profits which a brewer could make by reason of his having the right, under tying covenants, of supplying the licensed premises with the commodities consumed or sold thereon." That seems to indicate that those annual values were estimated upon a right and proper basis in accordance with the passages of authority which I have already cited. When those Sch. A values come to be added together, it is found that the average net Sch. A assessment on which tax was paid, was about 5500*l.* in respect of these houses. On the other hand, it is found that, by reason of the advantageous contract and leases which were made by Alfred Leney & Co., Ld., under the agreement of October 18, 1926, they produced a much larger sum, round about a sum of 20,000*l.* a year. Assessments have been served upon the appellant Company in respect of what are called the profits arising from these payments received by it from Fremlin Brothers, Ld., and Fremlins, Ld., the successor of the first company—in other words, upon the margin, roughly speaking, between the assessment under Sch. A and the moneys received as the total rent of these premises. The Special Commissioners

(1) [1898] 2 Q. B. 630, 639.

said: "It does not seem to us to be of primary importance whether this trading connection"—that is under the tie—"be described as goodwill or not. The arrangements originated in the agreement of October 18, 1926, under which the rent payable was fixed as the equivalent of the average net profits of the appellant Company for the three years ending September 30, 1926, with modifications. In arriving at the amounts of the Sch. A assessments, the profits which a brewer could make by the use of the premises as tied houses, or the enhanced rents which he would be willing to pay to secure those profits, were ignored, and upon the authorities were rightly ignored. The payments received by the appellant Company therefore included an element which was not and could not be taken into account in estimating the annual value of the hereditaments for the purpose of assessment to tax under Sch. A. In our opinion this element which is excluded from consideration for the purposes of taxation under Sch. A is a profit chargeable to income tax under Sch. D, and the grounds for attributing the whole of the excess of the payments over the aggregate of the Sch. A assessments to this element are stronger in this case than they were in that of the *Windsor Playhouse, Ld.* v. *Heyhoe.* (1) We accordingly hold that the assessments under Sch. D should be confirmed in the amounts of the excess of the payments received by the appellant Company over the aggregate amounts of the Sch. A assessments on the premises demised."

Finlay J. holds that there must be some different trade which apparently is carried on by the appellant Company, and he upheld the decision of the Special Commissioners and said that "it would be an extremely startling thing, if you suppose these two things separately done, if no assessment could be made in respect of annual sums paid for a very valuable right—namely, the right to supply the houses with liquor."

But although it may be a matter for the Legislature, we have to determine whether, under the present system of the

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(1) 17 Tax Cas. 481.

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income tax law, embodied as it is in the Income Tax Act, 1918, and subsequent Acts, this margin between the Sch. A assessments and what has been received by the appellant Company can be made the subject-matter of a separate assessment under Sch. D.

Now it is not easy to see what trade the appellant Company carry on in respect of these houses from which they receive the rent, quantified as it is under the leases; but I agree with the Solicitor-General that that does not conclude the matter, because under Sch. D it is possible to tax "the annual profits or gains arising or accruing to any person in the United Kingdom from any kind of property whatever," but that tax has to be charged under the Cases which are enumerated in r. 2 of Sch. D. The Case that would be appropriate to such property would be Case VI., which enables a tax under Sch. D to be charged "in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule." If, therefore, the tax has already been imposed upon these annual profits or gains under Sch. A, it is excluded from the cognizance of Sch. D.

I think a mistake often arises from treating Sch. A as dealing solely with the annual value which enures to a landlord in respect of the real property which he holds. It has been pointed out by Lord Macnaghten in *London County Council* v. *Attorney-General* (1) that what is taxed, whether under Sch. A or Sch. D, are profits and gains. He says: "It is a tax on 'profits or gains' in the case of duties chargeable under Sched. A and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge. And it is to be observed that the expression 'profits or gains' which occurs so often in the Income Tax Acts is constantly applied without distinction to the subjects of charge under all the schedules." That passage still holds the field. Lord Dunedin refers to it in

(1) [1901] A. C. 26, 36.

the *Salisbury House* case (1) and quotes Lord Macnaghten's comments on the leading judgment of the Court of Appeal in *London County Council* v. *Attorney-General* (2), which said: " 'The tax under Schedule D is a tax upon "gains and profits," an entirely different tax from the tax under Schedule A.' Lord Macnaghten observed 'With all deference, I do not think that that is a sound view of the Income Tax Acts.' " In other words, differing from the Court of Appeal, he held that whether you are taxing under Sch. A or Sch. D, you are taxing profits or gains, but under Sch. A you are taxing profits or gains arising from land.

Now, what is embraced in that? We are told first of all to go back to Sch. A of the Income Tax Act, 1918: "Tax under Sch. A shall be charged in respect of the property in all lands" and so on, and when we come to first rule we are told under the general rule for estimating the annual value of lands: "In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed and of whatever value . . . . the annual value shall be understood to be:—(1.) The amount of the rent by the year at which they are let, if they are let at rackrent . . . . ; or (2.) If they are not let at a rackrent so fixed, then the rackrent at which they are worth to be let by the year." Now that is the standard which is applicable to lands which are capable of occupation and for whatever purpose they are occupied or enjoyed.

In the course of the argument by the Solicitor-General, Slesser L.J. called attention to No. III. of Sch. A, which has now been altered by the Finance Act, 1926, but as it stood it embraced a number of profits arising otherwise than merely as rent; and I called attention also to No. II., which embraces this—whether it has been altered or not I care not—"In the case of manors and other royalties, including all dues and other services or other casual profits . . . . the annual value shall be understood to be" so and so. In other words, Sch. A is intended to cover the profits and gains which are derived, and are enjoyed for whatever purpose, from the land,

(1) [1930] A. C. 432, 441.

(2) [1901] A. C. 26, 36.

and the amount at which that assessment is to be quantified is the amount which they are worth to be let at by the year.

In the present case we have the fact that there is a large margin between the assessment properly imposed under Sch. A and the actual sum received by the appellant Company. That that does not give any particular guide or justify the imposition of a further assessment is illustrated by *Rossdale* v. *Fryer* (1), in which it was pointed out that the assessment that had been made under Sch. A governs the amount, whatever may be the vicissitudes of that same property in successive hands. Scrutton L.J., in giving judgment, says (2): "If I am right in the view that I expressed at the commencement of the judgment that the tax on land is not according to the actual receipts but the assessment, then 750*l.*, the actual rent, is not a sum on which the landlord can be taxed."

In *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (3) Lord Halsbury points out that you are not to rate the tenant's trade. He says: "The trade is excluded from valuation by the terms of the statute. You are to rate the premises according to their value; therefore it would be very wrong indeed to rate the trade, or to treat it as you would if you were dealing with the question for the income tax. You are not rating the income—you are rating the premises." This case is of value as showing what is the right measure on which you are to base your annual value; all the circumstances of the particular occupation and the mode in which the trade has been carried on are legitimately subjects of inquiry.

I have pointed out already that no objection can be taken to what has been done in estimating the annual value. When that has been done, *Coman* v. *Governors of the Rotunda Hospital, Dublin* (4), seems to put an end to the possibility of a further assessment. In that case there was a separate independent activity which was derived from the letting of the hall; but Lord Atkinson says (5): "It has frequently been decided

(1) [1922] 2 K. B. 303.
(2) Ibid. 313.
(3) [1901] A. C. 175, 180.
(4) [1921] 1 A. C. 1.
(5) Ibid. 27, 28.

that for the purpose of this valuation not only is the site of the house or building, and its quality and condition, to be taken into account, but that if some lucrative trade or business has been carried on in it then its inherent capacity (not personal to the occupier carrying on this trade or business) to secure a profit should be taken into consideration." Then further on he says: "The case of licensed premises forms no exception to this rule, for the licence to carry on the trade of a publican is not a licence purely personal to the publican." Then he goes on to point out that unless you have something independent of Sch. A, it is covered by Sch. A.

Then we come to the *Salisbury House* case. (1) In that case, the Special Commissioners and Rowlatt J. had come to the conclusion that there was a trade carried on—the totality of the trade—of letting the premises, which included an enhanced value of the flats which were let, and that in respect of that, an assessment under Sch. D would lie. There was no question that an assessment under Sch. D would lie in respect of the profits derived from the services rendered to the tenants; but when Lord Dunedin is considering whether that further assessment can be made, he says this, after having put his colloquy between the appellant and the tax-gatherer (2): "The rents, having been assessed under Schedule A, are, so to speak, exhausted as a source of income, and the so-called concession made by the appellant that there should not be double taxation, and that therefore he would be willing to allow deduction of the sum paid under Schedule A, is a concession which is beside the mark. It is a concession to avoid double taxation, but the concession cannot come into being where double taxation does not exist, and here it does not exist because, it being imperative to deal with the rents under Schedule A, there is no possibility of subsequently dealing with them under Schedule D." Lord Atkin, dealing with the various Schedules, said (3): "My Lords, nothing could be clearer to indicate that the Schedules are mutually exclusive; that the specific income must be assessed under

(1) [1930] A. C. 432.
(2) Ibid. 440.
(3) Ibid. 455.

the specific Schedule; and that D is a residual Schedule so drawn that its various Cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the actual Schedule was drawn in the widest terms."

Now, if that be so, if the Schedules are mutually exclusive, there has been an assessment under Sch. A. That catches at its own proper and appropriate measure the profits and gains that arise from the land. It has its own measure, and that measure is not defeated nor is it enhanced by matters which take place outside and are not appropriate to the proper measure belonging to Sch. A. The fact, therefore, that there is this much larger sum received by way of rent by the appellant Company is really irrelevant. They pay the sum which they are assessed to pay under the rules appropriate to Sch. A, and although it may be tempting to say that there exists here a profit that ought to be taxed and is not taxed and invites taxation, one has to see whether or not it can be charged under the present system of the Income Tax Acts. In my opinion it cannot. If it is to be taxed, it must be done by some charge imposed upon it by the Legislature.

We cannot make for ourselves some assessment which seems suitable in the circumstances. We have to apply the existing rules, and under these existing rules, on payment under Sch. A, there is no more that can be imposed upon the appellant Company in respect of this enhanced profit, for they do not carry on a trade, nor have they an interest in property apart from what has already been assessed under Sch. A. Sch. D, therefore, to my mind, is inappropriate and cannot be applied.

For these reasons, the appeal must be allowed with costs here and below.

SLESSER L.J. In December, 1926, the appellant Company, who were brewers, closed down their brewery, and since that time at all material times the whole of their income has been derived from payments made to them by two companies, at first Fremlin Brothers, Ld., from 1928 to 1930, and after

1930 Fremlins, Ld., in respect of leases granted by Alfred Leney & Co., Ld., the appellant Company, to Fremlin Brothers, Ld., or Fremlins, Ld. Those leases, which form part of the Case which we have considered, demised to the tenants for nearly the whole period which could be demised a large number of public-houses, and it is in respect of the rents paid under those leases that an assessment has been made under Sch. A of the Income Tax Act, 1918, the tax being charged in respect of the property in the land. So far there can be no question but that that was in every way an appropriate and proper assessment. But it is said here by the Crown that by reason of the fact that in the leases of those public-houses so assigned there is contained as between Leney & Co:, Ld., and the publican certain covenants, which I will refer to, restraining the publican's right to buy beer and other commodities where he will, that fact takes the property which has been demised from Leneys to Fremlins, Ld., out of the ambit of Sch. A in so far as it is concerned with that part of the leases which is concerned with what is called the tie or restriction with regard to the sale of beer and the monopoly created. That is really the point.

Now as I see this case, bearing in mind fully what Mr. Hills says, which I accept, that the mere use of the word "rent" is by no means conclusive of the matter, nevertheless this is in substance no more and no less than an agreement between landlord and tenant, and I am unable to see that, because what has been here demised includes the tenancies which have restraining covenants in them, this makes the transaction any more or any less a transaction as between landlord and tenant or makes this income received anything but an income arising out of the land.

Now what is the position as regards these premises? Originally these agreements by Messrs. Leney and Fremlins were of an informal kind, but after the formation of Fremlins, Ld., they were reduced to formal leases. In those leases there is a schedule containing the names of all these public-houses, the terms and the rents and the dates and the parties to the leases and so on. When we come to look at the

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tenancies between Messrs. Leney and the publicans, some of which have been exhibited, we find that it is there provided that the expression "landlord" shall, wherever the context admits, include the successors in title. So that the effect is that after these demises Fremlin Brothers and Fremlins, Ld., became the successors in title of Messrs. Leney and so became the landlords of these publicans, and Messrs. Leney ceased to be the landlords within the meaning of those tenancy agreements.

A typical tenancy agreement, exhibit "L," is one that first of all deals with letting the public-house, in that case the Wellington Hotel, for a certain sum per annum. Then in clause 2 come the agreements (*a*) to pay the rent, (*b*) to pay all rates, (*c*)—and this is the important one for the purpose of this case—"to purchase from the landlords, their nominee or nominees, ale, beer, stout, porter, and through no other company or companies." Now, of course, after the transaction between Leneys and Fremlins, Fremlins become the landlords, the nominees would be the nominees of Fremlins, and no longer the nominees of Leneys, who have dropped out of the matter, because in my view Fremlins have become, by the operation of the clause to which I have referred, the landlords. It then provides that the tenancy may be determined by either party—that would be the publican now or Messrs. Fremlin—giving to the other three calendar months' notice in writing to expire, but no such notice is to be given by the tenant at a date earlier than one year from the commencement of the tenancy. Then there is power to the landlord, when a tenant has been convicted of any offence against the law, to give one week's notice. All these matters seem to me incident to the general agreement of landlord and tenant, and although it may be, as the Special Commissioners have found, and as Finlay J. accepts, that the major motive for entering into these agreements was the remunerative value of the monopoly conferred by that covenant, I think it would be altogether wrong, and I can find no justification in the authorities or in logic for saying that because the motive or object of these parties in entering into this was rather the acquisition of a monopoly than the acquisition of the right to be a landlord of a public-house, therefore this is to be dissected, as Finlay J. said, into two businesses. I can only see here—and I suppose the matter is only one of impression—one relation between Messrs. Leney and Messrs. Fremlin, and that is the relation of landlord and tenant. The mere fact that such a relation produced a profit which is to be found expressed in a higher rental than might otherwise be the case does not seem to me to meet the matter. In other words, bearing in mind what Mr. Hills said, I do think that it is in truth a rent and not merely a rental to cover two or three different matters, but in reality a rent for a property to which certain covenants are attached, those covenants dealing, it may be, with matters which do not necessarily become incident to the land as such but are included here as a part of the general agreement between the parties.

In that view I must confess to myself I find all the authorities of very little assistance, because the matter does seem to me to come back to this: whether apart from the form of this agreement there is here, first, an ordinary tenancy agreement and, secondly, the assignment of the business. I can find no assignment of the business; I can only find a tenancy agreement to which are attached certain covenants dealing with certain matters which are carried on in that place. It does quite often happen that in a tenancy agreement there are covenants not profitable but protective: agreements not to carry on a certain trade, not obligations to purchase in certain ways or to carry on, but agreements not to carry on, agreements not to trade at all, in cases of residential property and the like. All these are incidents of the relation of landlord and tenant, and the mere fact that in this case this particular covenant may or may not prove profitable does not seem to me to alter the matter. It may be profitable to have a negative covenant restraining a person in a residential area from carrying on a certain trade. That may have an effect which increases the rental, as the person knows that he will not be menaced by unsatisfactory occupations existing round about him. That is no reason for taking the agreement out of the general ambit of a landlord and tenant agreement. So here, as it seems to me, the obligation that if a man buys beer he is to buy in a certain place—and, be it noted, there is no obligation on the tenant to purchase beer in any given quantities, it is only, as I read the tenancy agreement, that if he does buy it he is to buy it from a certain source—does seem to me merely incidental to the general position of landlord and tenant.

Therefore to this extent I think Mr. Hills is right in saying that the *Salisbury House* case (1) has no very great bearing on this case; nor, may I add, has the *Rotunda* case. (2) The whole question is, What have the parties agreed to do? That, it seems to me, is a matter of law depending on the proper construction of the agreement into which they have entered. Therefore, the finding of fact of the Special Commissioners, that the primary object of the agreement was having, what the Commissioners call a trading connection, does not seem to me to be material. We are not concerned here, as I see it, with motives but with the actual transaction which is being carried out.

For these reasons, I find myself, with regret, in disagreement with the learned judge, who seems to have based his judgment on the considerations of motive rather than on the consideration of the actual legal transaction entered into.

ROMER L.J. The question that arises upon this appeal is quite clearly defined in the respective contentions of the parties set out in the Case. I am reading from para. 12 of the Case so far as it is material for the purpose: "It was contended on behalf of the appellant Company:—(*a*) That the payments received by the appellant Company under the leases or agreements for lease were true rents issuing out of corporeal hereditaments; (*b*) That the subjects demised were the corporeal hereditaments and nothing else; (*c*) That there was no authority for analysing these payments: there was nothing to analyse; (*d*) That the tying covenants in the agreements with the tenants of which the lessees obtained the benefit were restrictive and ran with the land, and any

(1) [1930] A. C. 432.

(2) [1921] 1 A. C. 1.

advantages that might be derived from them flowed from the corporeal hereditaments demised."

The contentions on behalf of the Crown are set out in para. 13 and again, so far as material for the present purposes, are as follows: "(*g*) That the rents were in fact paid partly for premises assessable under Sch. A and partly for other matters." I read that first because the other matters are evidently those referred to in sub-clauses (*b*) and (*d*), which are as follows: "(*b*) That the effect of the transaction was to transfer to the lessees the goodwill of the appellant Company's trade with the tied tenants." Then: "(*d*) That the benefit of the tying covenants was severable from the ownership of the properties." In other words, the appellants are saying that the rent which they receive under the leases from Fremlins is a true rent paid for the corporeal hereditament and nothing else.

It is said on behalf of the Crown that only part of that rent is payable for the hereditament, and the rest of it is paid for goodwill, or, which may be the same thing, for the acquisition of the tie covenant. If the appellants are right as to what the rent is paid for they are, in my opinion, entitled to succeed on this appeal. If the Crown is right in saying that part of this rent is paid not for the hereditament at all but for something else, then so far as the rent is paid for something else the Crown is right, and the appellants would be properly assessable under Sch. D in respect of that part of the rent.

Now before considering which of those two contentions ought to prevail I would like to get rid of one argument that is stated in para. 13 (*e*) of the Case. Under that sub-paragraph the Crown contends: "That the assessments on the properties under Sch. A were necessarily restricted to their bare annual value, without taking into account the brewer's profits or the enhanced rents which a brewer would be prepared to give to secure such profits by the use of the properties as tied houses." That is an argument which found favour apparently with the Special Commissioners, who found as follows: "In arriving at the amounts of the Sch. A assessments the profits which a brewer could make by the use of the premises as tied houses, or the enhanced rents which he would be willing to pay to secure those profits, were ignored, and upon the authorities were rightly ignored. The payments received by the appellant Company therefore included an element which was not and could not be taken into account in estimating the annual value of the hereditaments for the purpose of assessment to tax under Sch. A. In our opinion this element which is excluded from consideration for the purposes of taxation under Sch. A is a profit chargeable to income tax under Sch. D." That clearly means that, inasmuch as it is excluded from consideration for the purposes of ascertaining the annual value under Sch. A, therefore it falls under Sch. D. It is perfectly true that the fact that the brewer is willing to give a very much higher rent for a public-house because of his anticipation, if he becomes lessee, of making very large profits from the supply of beer to the house, ought not to be taken into consideration in ascertaining the annual value for the purposes of Sch. A, but it by no means follows from that that the large rent which in the end he pays for the premises because of his anticipation of profits is not a rent in the true sense of the term. The two things have no connection whatsoever.

I will now turn to the other two contentions of the Crown to which I have already referred. The first is, that the rent paid by Fremlins is not a true rent because it includes the goodwill or a portion of the goodwill of Leneys, the appellants. So far as any goodwill is passed by the leases to Fremlins it is merely and solely goodwill attaching to the premises. Everybody knows that premises to which a goodwill is attached will fetch larger rents in the market than premises to which no goodwill is attached. I am not, of course, referring now to the personal goodwill of the tenant, but what I may call the goodwill of the house. The fact that a man pays a larger rent for a house to which a goodwill is attached is no indication whatsoever that the rent which he pays is not a rent paid for the hereditament and nothing else. It is quite untrue to say that part of his rent is paid for the goodwill attached to the house and part of the rent is paid for the corporeal hereditament itself. It is then said by the Crown, and I think this is really in effect the same contention, that part of this rent is paid for the benefit of the tie covenant. The benefit of the tie covenant passes, however, to Fremlins because, and merely because, they are assignees for a term of years of the reversion on the lease that contains the tie covenant. No doubt Fremlins are willing to pay a larger rent for these houses because of the tie covenant. I have no doubt indeed that it is the fact of the existence of those tie covenants that is responsible for the whole transaction, but it by no means follows from that, and it is quite untrue to deduce from that, that the rent which Fremlins are paying is a rent paid partly for the corporeal hereditament and partly for the benefit of the tie covenant. The rent is paid wholly and entirely for the corporeal hereditament. You might just as well say, in the case of a house whose lights are protected under the Prescription Act or by a grant, that where the house is let part of the rent is paid by the tenant for the house and part of the rent is paid for the benefit of the negative easement. Slesser L.J. referred to restrictive covenants. It frequently happens, as one knows, in what are called building estates, where a big estate is laid out in a number of plots, all of which are to be governed by one set of covenants, that that set of covenants provides that a particular trade shall not be carried on upon any of the plots except one. Having regard to the doctrine in *Renals* v. *Cowlishaw* (1) and *Tulk* v. *Moxhay* (2) the tenant of that one particular house will get the benefit of the restrictive covenant relating to trade affecting the other houses, and in consequence of that he will pay a higher rent if he wants to carry on that particular business because that particular business cannot be carried on by anybody in any of the adjoining houses. The fact that he gives a higher rent for the house in consequence of that protection is no ground whatever for saying that part of the rent is paid for the benefit of the covenant and part for the hereditament. The whole rent is paid for the hereditament and for nothing else. So in this case. In my opinion Messrs. Fremlin are paying this rent for the hereditament and for nothing else, although, as I say, it is clear they are paying a higher rent for the premises than they otherwise would do—a rent very much higher than the annual value ascertained for the purposes of Sch. A, because as lessees they get the benefit of these covenants.

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(1) (1879) 11 Ch. D. 866.

(2) (1848) 2 Ph. 774.

In the *Salisbury House* case (1) the Salisbury House company were assessed, and were held to be rightly assessable, under Sch. D in respect of the profits they made by providing, I think it was, lighting and that kind of thing. In my opinion if the Salisbury House company were desirous of retiring from business, and were offering their premises in the market to tenants, a tenant who gave a larger rent than the Sch. A assessment because he foresaw the possibility of making the profits that the Salisbury House company made which were assessable under Sch. D, would be paying a rent for the hereditament only, and it would be impossible to split up the rent which he agreed to pay the Salisbury House company in the way in which it is suggested that the rent should be split up in the present case.

To take another example from cases which have been cited to us: in the *Rotunda* case (2), if the charitable corporation there had granted a lease of the Rotunda, and a tenant, in estimating the annual sum he was prepared to pay for the lease of the Rotunda, had taken into consideration the possibility of deriving profits from letting out the rooms in the way the charitable corporation did, it would be impossible to say that the rent he paid was not a rent paid for the corporeal hereditament.

For these reasons it appears to me, with great respect to Finlay J., that he arrived at a wrong conclusion in the case and that the appeal ought to be allowed.

Appeal allowed.

Solicitors for appellant Company: *Godden, Holme & Ward.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1934.

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